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84-1573

No.

In The

Supreme Court of the United States

October Term, 1984

BHARATI DESAI,

Petitioner,

vs.

TOMPKINS COUNTY TRUST COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CORRECTED COPY

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Second Circuit has applied an impermissibly high standard of review in this Title VII case.

2. Whether the United States Court of Appeals for the Second Circuit has applied Federal Rule of Civil Procedure 52 (a) out of conformity with Courts of Appeals in other circuits and this Court's prior decisions.

3. Where the District Court has failed to consider whether the defendant's termination of plaintiff's employment, even if not retaliatory, was nevertheless discriminatory, did the Circuit Court improperly affirm without itself considering the question?

4. Where the District Court has rejected defendant - employer's proferred justification for its failure to promote the plaintiff, but then substituted its own theory, did the Circuit Court improperly affirm?

5. Whether plaintiff's *pro se.* motion for a new trial under Federal Rule of Civil Procedure 59 (a) should have been treated as a Rule 60 (b) (1) or (6) motion by both the District Court and the Circuit Court.

PARTIES TO THE PROCEEDINGS BELOW

The caption of this case in this Court contains the names of all parties to the proceeding (No. 84-7381) in the United States Court of Appeals for the Second Circuit, the Court whose judgment is sought to be reviewed. The parties are the Petitioner, BHARATI DESAI (hereinafter referred to as "the plaintiff") vs. the Respondent, TOMPKINS COUNTY TRUST COMPANY (hereinafter referred to as "the defendant", "the bank", or "T.C.T.C.").

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Bharati Desai respectfully petitions this Court for a Writ of Certiorari to review the opinion and order of the United States Court of Appeals for the Second Circuit entered on December 12, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is not reported and appears as Appendix A to this petition. The Findings of Fact and Conclusions of Law and Judgment of the United States District Court for the Northern District of New York dated March 26, 1984 is not reported and appears as Appendix B to this petition. The oral decision of the United States District Court for the Northern District of New York denying plaintiff's post-judgment motion rendered May 8, 1984, is not reported and appears as Appendix C to this petition. The District Court's Order denying plaintiff's post-judgment motion, entered May 23, 1984, is not reported and appears as Appendix D to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, Title 42 U.S.C. §2000e - 2 (a) (1); Title 42 U.S.C. §2000e - 3 (a); and U.S.C. Federal Rules of Civil Procedure, Rule 52 (a). Also involved on a separate issue are U.S.C. Federal Rules of Civil Procedure, Rule 59 (b) and Rule 60 (b) (1) and (6). These provisions are set forth in Appendix E to this petition.

STATEMENT OF THE CASE

Procedural Facts.

Plaintiff, Bharati Desai, commenced this action by filing and service of her summons and complaint on or about November 8, 1982. The complaint (Appendix F) alleged three causes of action: 1. That defendant bank's failure to promote the plaintiff, a native of India, even though she had more seniority and experience than the white woman who was given the position, was invidious discrimination based on national origin, race and color, in violation of Title VII. 2. That plaintiff's employment was summarily terminated by defendant following plaintiff's complaints of discrimination, and in retaliation therefor. 3. Pendant state claim for breach of contract.

Following the District Court's decision on defendant's motions to dismiss (which decisions were not appealed and are not at issue on this application), defendant's answer was served on or about March 4, 1983.

Discovery proceedings followed, including several depositions of defendant's employees. The transcripts of these depositions (with one exception) were filed in the District Court either by stipulation of the parties before trial or in lieu of testimony at trial.

The District Court subsequently, on motion of defendant, dismissed plaintiff's third cause of action (pendant state contract claim). This decision and order was not appealed and is not at issue on this application.

The action was tried by the District Court for the Northern District of New York, Hon. Neal P. McCurn, Justice Presiding, on March 7, 8 and 9 , 1984.[1] At the close of trial and following submission of Memoranda of Law and Requests for Findings of Fact and Conclusions of Law by both parties, the District Court

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[1] Total length of trial—about one and one-half days.

rendered its Judgment and Order dismissing plaintiff's complaint on March 26, 1984 (Appendix B). In his decision, Judge McCurn stated that he had applied the analysis of *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and of *Grant v. Bethlehem Steel Corp.*, 622 F. 2nd 43 (2d Cir. 1980), in holding that although plaintiff had proved her prima facie case, she had failed to carry her ultimate burden to prove that the reasons alleged by defendant for its failure to promote her and for her termination, were pretextual.

On appeal to the United States Court of Appeals for the Second Circuit from the dismissal of plaintiff's complaint, plaintiff was constrained to argue that the District Court's findings of fact and conclusions of law (including even resolution of questions of mixed law and fact, legal presumptions and inferences to be drawn from the undisputed facts, and the ultimate question of discrimination) were "clearly erroneous." *See, e.g. EEOC v. Local 28, Sheet Metal Workers International Association*, 532 F. 2d 821, 827 (2d Cir. 1976); *Coalition for Education in District One v. The Board of Elections of City of New York*, 495 F. 2d 1090, 1093-4 (2d Cir. 1974).

The Circuit Court in its decision and order of December 12, 1984, apparently applying the strict standard of reviewability of Rule 52 (a) to all aspects of the present case, refused to make its own independent examination of the record, and instead summarily affirmed the dismissal of appellant's complaint (Appendix A). No reasons for its affirmance were given.

The District Court's Judgment and Order was docketed April 4, 1984. Thereafter, by handwritten Notice of Motion and supporting papers dated April 18, 1984, plaintiff moved *pro se.* for a new trial (Appendix G). The parties filed various supplemental affidavits and Memoranda of Law to be considered on the motion (see Appendix G) and the motion was argued before Judge

McCurn on May 8, 1984 (Appendix C). The District Court denied plaintiff's motion for a new trial by Order dated May 17, 1984 (Appendix D).

Plaintiff appealed the District Court's denial of her motion, arguing to the Court of Appeals for the Second Circuit, that her *pro se.* motion should have been treated as a Rule 60 (b) motion and heard and decided on its merits, and requesting a remand for this purpose.

The District Court had expressly stated that its comment concerning the alleged sufficiency of plaintiff's legal representation at trial was "not a part of the decision in this case, I want to make that clear. . ." (Appendix C). Nevertheless, the Second Circuit seized on this comment in affirming Judge McCurn's Order denying plaintiff's motion. The Second Circuit in its decision refused even to reach the question whether a *pro se.* litigant's Rule 59 (b) motion should have been treated by the District Court, in the exercise of its discretion, as a Rule 60 (b) motion.

Substantive Facts.

Plaintiff, Bharati Desai, is a native of India. She had lived in the United States, in the Village of Dryden, New York, for about 2-1/2 years before applying for employment with defendant bank (T.C.T.C.). She was well educated, having a law degree from India, and she had prior employment experience both in India and in Great Britain which included work as a teacher, law work in both India and Great Britain, and four months' prior experience working in a bank in India (see Appendix H, plaintiff's employment application).

On June 8, 1979, plaintiff was informed of a job opening for a teller at the Dryden branch of T.C.T.C., and she promptly applied for the position and was hired, commencing work the following Monday, June 11, 1979. Plaintiff was trained as a teller at the main branch of the bank (in downtown Ithaca, New York) for

two weeks. Then on July 3, 1979, she began work at the Dryden bank, at the third window, taking the place of one Sheila Moore who had recently left the bank's employ.

The other two teller positions at the Dryden bank were at that time occupied by one Sandy Williamson (window two) and by "lead" teller, Pamela Ordway (window one). Both of these other employees had already notified the bank's personnel director, Helen Meek, and the Dryden branch manager, Richard Lynn, that some time later in the summer, they too would be leaving. Thus, the position of "lead" teller would become open at that time.

The evidence at trial was uncontroverted that the position of "lead" teller in the Dryden branch of T.C.T.C. was a position of considerable responsibility, and with supervisory authority over other tellers. Thus, although not necessarily carrying with it an increase in pay, there is no question the job of lead teller would be considered a promotion, and the District Court impliedly so found (Appendix B).

Sometime in May, 1979, a white woman, Susan Morse, also applied for employment with T.C.T.C., and was immediately considered by Helen Meek and by Richard Lynn, for a position at the Dryden Bank, since they knew at that time that both Pamela Ordway and Sandy Williamson would be leaving their jobs sometime later in the summer. Meek and Lynn both claimed at trial that they had made up their minds to replace Pamela Ordway, the lead teller, with the white candidate Susan Morse, as early as May, 1979, even though she was still at that time a college student with no prior banking experience, or for that matter, work experience of any kind, and even though she would not be available to work until August (see Appendix I, Susan Morse's employment application). This decision to hire Susan Morse for the position of lead teller was allegedly made long prior to plaintiff's commencing employment at the bank (and much longer than Susan Morse's). Nevertheless, the *sole excuse* offered by defendant

bank at trial for the failure to promote the plaintiff to the position when it became open, was that the job had already been "pre-filled" by the choice of Susan Morse for the position months prior. (See Appendix J, portion of defendant's attorney's closing statement, in which he stated defendant's theory that the failure to promote plaintiff was justified by defendant's claim that the job had already been filled.)

In his deposition taken April 19, 1983, branch manager, Richard Lynn, expressly *admitted* to applying impermissible ("cultural", *i.e.* racial) criteria in his choice of Susan Morse over the plaintiff for lead teller (Appendix K).

Although allegedly "hired" in May, 1979, Susan Morse began her employment with defendant bank, as a teller trainee at the main branch on August 1, 1979. She trained there until August 24, 1979, when Sandy Williamson (of the Dryden branch) resigned. Plaintiff then took Sandy Williamson's place at the second window, and Susan Morse began at the third window.

Almost immediately after Susan Morse began to work at the Dryden branch of T.C.T.C., plaintiff sensed that Susan was being trained to take over Pamela Ordway's position as lead teller. Plaintiff reasonably believed that given her longer length of service both with T.C.T.C. and at the Dryden branch, and her greater work experience in general, and in accord with the bank's own policy manual (Appendix L), she should have been in line for the lead teller position, rather than the white college student who had just been hired.

As a consequence, on September 12, 1979, plaintiff met with Mrs. Meek, the personnel director. At this meeting, plaintiff unequivocally and undisputedly complained that "I am a victim of discrimination." Mrs. Meek's response to plaintiff's complaint was to admonish plaintiff not to use that word and to declare that "the Tompkins County Trust Company [does not] discriminate. ... If we did discriminate [you] would not have been on staff."

The meeting of September 12, 1979 concluded with Mrs. Meek's deliberate and admitted lie to plaintiff that if she continued to do her work well and to be "patient," she would be fairly considered for the promotion (even though Susan Morse had in fact already been chosen).

Subsequent discussions with Mr. Lynn about the same concern (although not using the actual word "discrimination"), resulted in his false assurances also that if she would be "patient," she would be considered for the position. The substance of these conversations were related in depositions, and at trial, by Mr. Lynn and Mrs. Meek themselves, and were undisputed.

On Friday, September 21, 1979, Pamela Ordway terminated her position with the bank. The next Monday, September 24, plaintiff came to work to find that Susan Morse had been moved from the third window to the first window, obviously taking Pamela's place, and bypassing plaintiff for the position of lead teller. This was despite Mr. Lynn's and Mrs. Meek's recent assurances that plaintiff would be fairly considered for the job and that a decision had not yet been made.

Plaintiff again vehemently protested to Mr. Lynn, reminding him that only a few days before he had assured her that the job was still open.

Plaintiff does not dispute that within the next two-three weeks, a highly charged discriminatory atmosphere was created by defendant's promotion of Susan Morse over plaintiff who was more qualified for the job and had a longer length of service both with the bank and at the branch office (in violation of the bank's own written policy manual and procedures) (Appendix L). This discriminatory atmosphere, created by defendant, admittedly led to "friction" between the two women (Susan Morse and plaintiff).

On October 19, 1979, Mr. Lynn requested that Mrs. Meek, as personnel manager, remove the plaintiff from the Dryden branch

of the bank. He did not ask that her employment with T.C.T.C. be terminated, only that she be transferred to another branch.

Instead, without any prior warning whatsoever, and following on the heels of her complaints of discrimination and her continued expressed unhappiness with that situation, plaintiff was summarily fired. When plaintiff asked the reason she was being fired, she was told "body odor" and "customer complaints." She was not shown any written documentation of the alleged reasons for her termination because, in fact, there was nothing in writing at that time.

Immediately following plaintiff's summary termination, defendant's officers and employees began to manufacture their paper case against plaintiff. Mrs. Meek admitted to having requested various employees of the bank to write memos and letters about plaintiff. It is undisputed that prior to plaintiff's termination, there was no written documentation whatsoever of the myriad "problems" which allegedly justified plaintiff's termination.

In fact, the only written documentation of plaintiff's job performance placed in her personnel file *prior* to her termination was her excellent "Probationary Employee Report," dated September 26, 1979 (Appendix M).

Also following plaintiff's summary firing were a number of meetings at which, admittedly, efforts were made to dissuade the plaintiff from filing her Human Rights Complaint. There were also post-termination job offers made by defendant to plaintiff to work in a different department of the bank.

On November 7, 1979, plaintiff filed her Human Rights Complaint. She received her "Right to Sue" letter on October 29, 1982. The present lawsuit followed, concluding in the District Court's Judgment and Order of March 26, 1984, which plaintiff appealed, as required by decisional law of the Second Circuit as "clearly erroneous." *See, e.g., EEOC v. Local 28, supra; Coalition for Education v. Board of Elections, supra.*

Following entry of the District Court's Judgment on April 4, 1984, plaintiff moved *pro se.* for a new trial. See discussion of the procedural facts relating to this motion, *supra* at pages 3-4.

REASONS FOR GRANTING THE WRIT

There is a decided split of authority among the Circuit Courts of Appeals as to the applicability of Federal Rules of Civil Procedure, Rule 52 (a) to Title VII disparate treatment cases, as this Court expressly observed in *Pullman-Standard v. Swint,* 456 U.S. 273, 289-90, n. 19 (1982). *See also, The Standard of Appellate Review in Title VII Disparate-Treatment Actions,* 50 U. Chi. L. Rev. 1481, 1486-87 (1983). As noted in that law review article, the First, Second, Third, Fourth, Ninth and Tenth Circuits have held that a district court's finding of unlawful discrimination (or lack thereof), like findings of fact in general, must be honored by a Court of Appeals unless clearly erroneous. By contrast, other circuits, including the Fifth, Sixth, Seventh, Eighth and District of Columbia, have distinguished "subsidiary" or "evidentiary" facts from the "ultimate" fact of discrimination, holding the latter freely reviewable.

As a consequence, a Second Circuit litigant, such as Bharati Desai, is held to a much heavier burden of persuasion on appeal than she would have had in a different circuit, for instance, the Fifth Circuit. *See, e.g., Causey v. Ford Motor Company,* 516 F. 2d 416, 420-1 (5th Cir. 1975); *Parson v. Kaiser Aluminum,* 575 F. 2d 1374, 1382-3 (5th Cir. 1978); *East v. Romine, Incorporated,* 518 F. 2d 332, 338-9 (5th Cir. 1975). Certiorari should be granted at bar for purposes of clarifying that Circuit Courts of Appeals should apply a free reviewability standard to Title VII disparate treatment cases, particularly where, as at bar, the case presents mixed questions of law and fact and allows for differing legal conclusions and inferences to be drawn from the undisputed facts. Certiorari should be granted also so that the outcome of a litigant's appeal in the important area of employment discrimi-

nation will not depend on the fortuitous circumstance of venue. Finally, certiorari should be granted so that Title VII plaintiffs on appeal, will have a fair chance to meet the very heavy burden of persuasion which is placed upon them by the McDonnell-Douglas and Burdine tests, which require the plaintiff to show the pretextuality of the myriad of excuses which an employer may invent, after the fact, to justify a prima facie discriminatory action.

On an alternate ground, the Court should grant the writ at bar for purposes of clarifying under what circumstances an untimely F.R.C.P., Rule 59 (a) motion should be treated as a Rule 60 (b) motion, particularly where a *pro se*. litigant seeks relief from the courts. This Court has held that Rule 60 (b) is to be liberally construed (*Klapprott v. United States,* 335 U.S. 601, *modified,* 336 U.S. 942 (1949), yet the rule is still being applied on an ad hoc basis. Certiorari should be granted as an opportunity for this Court to establish some guidelines.

ARGUMENT

THE SECOND CIRCUIT COURT OF APPEALS HAS APPLIED AN IMPERMISSIBLY HIGH STANDARD OF REVIEW IN THIS TITLE VII CASE, AND HAS APPLIED F.R.C.P., 52 (a) OUT OF CONFORMITY WITH COURTS OF APPEALS IN OTHER CIRCUITS AND THIS COURT'S PRIOR DECISIONS.

At bar, the Second Circuit disposed of plaintiff's appeal by a one-sentence conclusory affirmance (Appendix A):

> We affirm the dismissal of appellant's complaint substantially for the reasons stated in the Findings of Fact and Conclusions of Law of Judge Neal P. McCurn, dated March 26, 1984.

It is apparent that the Circuit Court, in affirming the District Court's decision, declined to make its own independent examination of the record, under a free reviewability standard, but in-

stead misconstrued F.R.C.P., Rule 52 (a) and applied a "clearly erroneous" standard even to the mixed questions of law and fact and the legal inferences and conclusions presented at bar. Not only does this perfunctory affirmance evidence that an incorrect standard of reviewability has been applied, but it leaves this Title VII plaintiff wondering whether she has had any review at all.

Plaintiff submits that had the Second Circuit Court of Appeals applied the proper standard of review; made its own independent examination of the record; and drawn its own legal inferences and conclusions, a number of undisputed and admitted facts overlooked by the District Court would have merited a reconsideration, quite likely leading to a reversal. Among these are the following:

1. Bank manager's admission of discriminatory motive. See Appendix K. Mr. Lynn explained that the reason he did not even consider Bharati Desai for the position of lead teller was because of "cultural" (*i.e.* racial) differences: "I knew I would have an easier time, perhaps, having someone who was more experienced in our culture and would know — I would have felt that I would have probably been more comfortable with that person." This is clearly an impermissible criteria, based on race, color and/or national origin, upon which defendant made its decision not to promote the plaintiff. Civil Rights Act of 1964, 42 U.S.C. §2000e-2 (a) (1). The District Court overlooked this admission of discriminatory motive. The Circuit Court declined to draw its own independent conclusion.

2. Other admitted statements against interest evidencing discriminatory motive (*see, e.g.*, letter of Susan Morse - Appendix N). Again, the Circuit Court refused to make its own independent interpretation of such comments, as "there were overwhelming cultural...barriers...."

3. Although not raised as a separate cause of action, there was an admitted incident wherein plaintiff was forced to engage in a personal practice as a condition of employment, even though she

had specifically protested that it was against her religious beliefs to do so. No attempt was made reasonably to accommodate her religious precepts and practices as required by 42 U.S.C. §2000e (j) and *Trans World Airlines v. Hardison,* 432 U. S. 63, 74 (1977). Again, the significance of this admitted incident as indicative of defendant's discriminatory attitude toward the plaintiff in other, more serious matters relating to her employment, is open to differing interpretations.

4. Bank's failure to follow its own stated policies and procedures in promotion (as set out in its policy manual [Appendix L])and the lack of any objective criteria for evaluating candidates for the position of lead teller. This kind of subjectivity in employment decisions has been held inherently suspect as a conscious or unconscious mask for discrimination. *See, e.g. Sweeney v. Research Foundation of State University of New York,* 711 F. 2d 1179, 1185 (2d Cir. 1983); *Kirkland v. Buffalo Board of Education,* 487 F. Supp. 760, 771 (W.D.N.Y. 1979), *aff'd* 622 F. 2d 1066 (2d Cir. 1980); *Abrams v. Johnson,* 534 F. 2d 1226, 1231 (6th Cir. 1976); *Carey v. Greyhound Bus Co., Inc.,* 500 F. 2d 1377 (5th Cir. 1974); *Robinson v. Union Carbide Corporation,* 538 F. 2d 652, 662 (5th Cir. 1976); *Rowe v. General Motors Corporation,* 457 F. 2d 348, 358-9 (5th Cir. 1972); *Crawford v. Western Electric Co., Inc.,* 614 F. 2d 1300, 1315 (5th Cir. 1980). The lack of objective criteria for promotion and the failure of the bank to follow its own stated policies and procedures permit an inference to be drawn that unlawful discrimination occurred. Under the free reviewability standard as applied in the Fifth and other Circuits, the Court of Appeals might well have drawn that permissible inference and reversed the District Court's ultimate finding of nondiscrimination in promotion. Under the "clearly erroneous" standard as adopted by the Second Circuit (*EEOC v. Local 28 Sheet Metal Workers,* 532 F. 2d 821, 827 [2d Cir. 1976]; *Coalition for Education v. The Board of Elections,* 495 F. 2d 1090, 1093-4 [2d Cir. 1974]), that opportunity was foreclosed. The Court was

bound to adhere to the inferences, if any, which the District Court had drawn from the undisputed facts.

5. Bank's failure to follow its own stated policies and procedures in terminating plaintiff's employment. Mr. Lynn and Mrs. Meek admitted to having not followed the bank's policy manual in terminating the plaintiff's employment (Appendix L). See comments under 4. above. *See, also, Flowers v. Crouch-Walker Corporation,* 552 F. 2d 1277, 1283 (7th Cir. 1977).

6. Inconsistencies in the bank's employees' testimony. The record of this case is replete with material inconsistencies in the testimony of the bank's employees both as compared to other employees and to their own prior statements. For instance, although alleged "body odor" was a excuse given for plaintiff's termination, the teller who worked immediately adjacent to her for six weeks in the summer, 1979, testified explicitly that there was *no* body odor. With respect to alleged "complaining customers," the bank's branch manager admitted to having included the name of at least one customer who emphatically did *not* complain, but "liked" the plaintiff. The alleged "complaints" of two other customers were likewise admittedly erroneously included in justification of plaintiff's termination, because they were not even allegedly told to the bank until after plaintiff had been fired.[2] The fact of these and other glaring inconsistencies in the bank's employees' own testimony raises an inference of pretextuality which the District Court ignored. Under a free reviewability standard on appeal, rather than the "clearly erroneous" rule applied at bar, the Circuit Court could have drawn its own conclusions as to the "mixed" question of pretextuality.

7. Post-termination documentation of reasons alleged for termination. It is undisputed that, prior to plaintiff's termination, there was not one scrap of written documentation in the record to

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[2] These being Martha Clark and William Petrillose whose names were also erroneously included in Judge McCurn's decision of March 26, 1984 (Appendix B).

justify her discharge. All the letters and memos written against plaintiff were hastily generated after she was fired. Defendant's admitted effort to build its case against plaintiff, post-termination, raises strong inferences in her favor, that the defendant's complaints were pretextual. *See, Mead v. U. S. Fidelity and Guaranty Co.*, 442 F. Supp. 114, 127 (D. Minn. 4th Div. 1977). Again, the issue of pretextuality as inferred from these undisputed facts, is an ultimate conclusion, which is entitled to the benefit of the Circuit Court's own independent judgment.

8. Post-termination job offer and efforts to dissuade plaintiff from filing her human rights complaint. Mr. Lynn testified that he never recommended that plaintiff be terminated; only that she be transferred to another branch of the bank. Mrs. Meek, after firing her, then admittedly offered her a job at the bank in Meek's own department. These facts are undisputed. The only dispute is how they are to be interpreted as casting serious doubt on the reasons given by defendant to justify plaintiff's termination, and showing pretextuality. The District Court failed to draw these inferences. The Second Circuit should not have felt constrained to affirm, by improper application of F.R.C.P., Rule 52 (a).

9. Probationary Employee Report. Undisputedly, the only pretermination documentation of plaintiff's work performance was her excellent Probationary Employee Report, dated September 26, 1979 (Appendix M). The document speaks for itself in showing unequivocally that at least as of September 26, 1979, there were no serious problems with plaintiff's work performance, and that all the reasons alleged for her subsequent summary termination were pretextual. In his closing argument to the District Court (Appendix J), defendant's attorney sought to show nonretaliatory motive on the part of defendant by claiming that such an excellent report would not have been written if plaintiff's termination was indeed retaliatory. Instead, he argued, defendant would have begun to build its "paper case" against her prior to her termination. Plaintiff does not have to make such a

circuitous argument, submitting instead that the report should be taken at its word. Once again, the matter of interpretation of this document as it has bearing on the question of pretextuality, is a mixed question of law and fact, or a legal conclusion to be drawn from the undisputed facts. The ultimate question of pretextuality should not have been subject to a clearly erroneous standard on review. There should be a definite distinction between pure questions of fact involving the choice of which disputed facts are to be believed (which is the province of the District Court); and mixed questions of law and fact, involving inferences to be drawn, the weight to be given, and the legal conclusions to be decided, from the undisputed, documented and admitted facts. *Pullman-Standard v. Swint,* 456 U.S. 273, 286, n. 16 (1982).

THE SECOND CIRCUIT IMPROPERLY APPLIED F.R.C.P., RULE 52 (a) IN REFUSING TO CONSIDER THE QUESTION WHETHER THE PLAINTIFF'S TERMINATION, EVEN IF NOT RETALIATORY, WAS NEVERTHELESS DISCRIMINATORY.

Bharati Desai did not dispute that after Susan Morse was unlawfully promoted to lead teller, a certain "friction" arose between the two women which made it difficult for them to work together. Mr. Lynn, himself, admitted in his deposition that this problem arose only *after* he had promoted Susan Morse over the plaintiff:

> Q. Did you notice any problems with Bharati's attitude prior to your designation of Susan as a lead person?
> A. No.

In resolving the alleged problem of the inability of Susan Morse and Bharati Desai to work together (a problem which defendant itself created), Bharati Desai, rather than Susan Morse, was discharged.

Given these undisputed historical facts, the District Court might weli have concluded that even if plaintiff's termination was not retaliatory, it was discriminatory, as being an impermissible solution to a highly charged discriminatory atmosphere which defendant had created by its unlawful discrimination in the first instance. The District Court failed even to consider this question except in the most conclusory fashion (Appendix B). The question being one of mixed law and fact and involving the ultimate issue of discrimination, should have been freely reviewable on appeal. Nevertheless the Second Circuit also declined to rule on this issue, even though it had been squarely presented. Rule 52 (a) was again, apparently improperly applied.

THE SECOND CIRCUIT IMPROPERLY APPLIED F.R.C.P., RULE 52 (a) IN AFFIRMING THE DISTRICT COURT'S FINDING OF NON-DISCRIMINATION WHERE THE DISTRICT COURT HAD EXPRESSLY REJECTED DEFENDANT'S PROFFERED JUSTIFICATION FOR FAILURE TO PROMOTE, BUT THEN HAD SUBSTITUTED ITS OWN THEORY.

The District Court in the present case expressly held that plaintiff had made out a prima facie case of unlawful discrimination on account of her race or national origin, in the failure of defendant to promote her (Appendix B). The District Court further expressly rejected defendant's proffered justification for its failure to promote the plaintiff, that being that there was no position open, it having been allegedly filled as early as May, 1979, prior to either plaintiff's or Susan Morse's employment with the bank (Appendix B).

This claim that the job had already been "pre-filled" when plaintiff made known her desire to be considered, was the only reason given by defendant for its failure to promote the plaintiff. All the other purported complaints against plaintiff were offered

by defendant to justify plaintiff's *termination*, not the failure to promote. Defendant's attorney spelled out this theory in his closing argument (Appendix J).

Although the District Court expressly rejected this theory[3], it nevertheless improperly undertook to fill the holes in defendant's case by adopting the excuses given by defendant for the termination of the plaintiff to justify the bank's failure to promote her. A full and independent examination of the record, unconstrained by F.R.C.P., Rule 52 (a), would have revealed that the plaintiff's prima facie case of discrimination in promotion under the McDonnell-Douglas test was left wholly unrebutted. Application of a proper standard of free reviewability as in the Fifth Circuit, would have resulted in a reversal of the District Court's decision of March 26, 1984 for lack of evidence. See, *Parson v. Kaiser Aluminum*, 575 F. 2d 1374, 1383 (5th Cir. 1978) where there was a similar failure of proof on defendant's part. As noted in commentary,[4] the application of different standards of review to Title VII disparate treatment actions in the various Circuit Courts, has "led to anomalous results." Certiorari should be granted (F.R.C.P., Rule 17).

PLAINTIFF'S *PRO SE.* MOTION FOR A NEW TRIAL UNDER RULE 59 (a) SHOULD HAVE BEEN TREATED AS A RULE 60 (b) (1) OR (6) MOTION, BY THE DISTRICT COURT AND BY THE SECOND CIRCUIT.

During the trial in the District Court, plaintiff, Mrs. Desai, asked to speak to the Court directly (Appendix O). As her post-trial motion papers (Appendix G) make clear, plaintiff sought

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[3] Such would have been unlawful discriminatory practice in any event. *Grant v. Bethlehem Steel Corp.*, 635 F. 2d 1007, 1011 (2d Cir. 1980). *See also, Abrams v. Johnson*, 534 F. 2d 1226, 1231 (6th Cir. 1976).

[4] *The Standard of Appellate Review in Title VII Disparate-Treatment Actions*, 50 U. Chi. L. Rev. 1481, 1487 (1983).

advice from the District Court concerning her rights to discharge her attorney, and either to substitute counsel, or to continue the trial *pro se*. The District Court denied plaintiff's request, apparently confusing her desire to know her "rights" (*i.e.* her procedural rights) with her substantive Title VII rights at issue in the case. The District Court then instructed plaintiff to consult with her attorney. Shortly thereafter, an unrecorded colloquy among Court and counsel, but excluding plaintiff, occurred.

Following the trial, and the District Court's Judgment and Order of March 26, 1984, plaintiff moved for a new trial (Appendix G). Plaintiff's motion was filed *pro se.* on April 14, 1984, 14 days following entry of the District Court's Order, and hence it was two days late under F.R.C.P., Rule 59 (b). The District Court denied the motion, holding simply that a late motion under Rule 59 (b) must be dismissed (Appendix D).

The District Court neglected to consider treating the plaintiff's *pro se.* untimely motion under Rule 59 (b) as a Rule 60 (b) motion, thereby reaching its merits. *See,* Moore, *Federal Practice,* Vol. 9, §204.12 (1) p. 69-70 (2d Edition). Plaintiff's motion could have been decided on its merits under clause (1) of Rule 60 (b), as involving "mistake", including judicial error. *See,* Wright and Miller, *Federal Practice and Procedure,* Vol. 11, §2858, p. 178 (1973). Alternatively, the merits of the motion could have been reached under clause (6) which affords relief upon a showing of "any other reason justifying relief from the operation of the judgment." Mrs. Desai urged the District Court to review additional evidence which her trial counsel had declined to present, and which Mrs. Desai believed was important to a fair determination of the case. These additional items of documentary evidence and testimony were not new evidence, and hence did not fall under Rule 60 (b) (2), but could have been considered under Rule 60 (b) (6) had the District Court not declined to hear the motion on its merits.

The Second Circuit Court in its affirmance, gave cursory consideration to the possibility of a remand to the District Court for a determination on the merits, in accord with its established procedure. *See, Jenkins v. Chemical Bank,* 721 F. 2d 876 (2d Cir. 1983); *Weiss v. Hunna,* 312 F. 2d 711, 713 (2d Cir. 1963), both cases factually similar to the present case. However, the Circuit Court then declined to remand to the District Court for a fact-finding, essentially deciding the merits of the motion by reference to the District Court's gratuitous comment that plaintiff's trial counsel appeared to have "very adequately represented her," even though that comment was expressly stated to be "not part of the decision in this case" (Appendix C).

Had the District Court not erred in refusing to hear plaintiff's motion on its merits and had the Circuit Court not compounded the error by summarily refusing to remand, a record would have been created upon which the merits of plaintiff's motion could be judged. As it stands, there is no way the issue can be determined since the record is barren.

Furthermore, had a fact-finding inquiry been made by the District Court (either in the first instance or on remand), it is likely that grounds justifying relief from judgment under either clause (1) or clause (6) of Rule 60 (b) would have been found.

Appellant's motion papers show sound reasons for her desire to discharge her trial counsel. She alleged attorney misconduct and a serious breach of ethics (See Appendix G). According to her motion papers, she sought as a remedy from the District Court an explanation of her right in a civil case to discharge her attorney. If afforded that right, she then intended to have either associate counsel continue with the trial or she would have handled it herself. Plaintiff, as a *pro se.* litigant was entitled to a careful consideration of the grounds she raised on motion and some assistance from the courts in having her motion heard. She received neither.

Certiorari should be granted as to this issue so that the circumstances under which courts should exercise discretion to treat an untimely Rule 59 (a) motion as a Rule 60 (b) motion can be more clearly defined. In this particular case, certiorari should be granted also so that at some stage in the proceedings plaintiff may have the opportunity to prove her claims of attorney misconduct and to show how her case was prejudiced thereby.

CONCLUSION

A WRIT OF CERTIORARI SHOULD BE GRANTED TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Plaintiff's application for a Writ of Certiorari should be granted in order that justice may be done in the present case, and also so that future Title VII plaintiffs presenting their appeals in the Second Circuit (and in other circuits similarly construing F.R.C.P., Rule 52 [a] will have the benefit of a fair and independent review.

Certiorari should also be granted with respect to the issue of plaintiff's post-trial motion, for the reasons stated at pages 17-20 above.

Respectfully submitted,

CONNIE FERN MILLER
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APPENDICES

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit, December 12, 1984.

United States Court of Appeals, Second Circuit, Dec. 12, 1984
(SEAL)

United States Court of Appeals
for the
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of December, one thousand nine hundred and eighty-four.

Present:

HONORABLE WILFRED FEINBERG,
Chief Judge

HONORABLE IRVING R. KAUFMAN,
*/

HONORABLE MAX ROSENN,
Circuit Judges.

BHARATI DESAI,

Plaintiff-Appellant,

-against- 84-7381

TOMPKINS COUNTY TRUST COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

---

*/ Honorable Max Rosenn, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said district court is AFFIRMED.

1. We affirm the dismissal of appellant's complaint substantially for the reasons stated in the Findings of Fact and Conclusions of Law of Judge Neal P. McCurn, dated March 26, 1984.

Desai v. Tompkins County Trust Co.
84-7381
Page 2

2. Appellant's motion for a new trial, which was based principally on the alleged inadequacy of her trial counsel, was properly denied because it was not served within the time limits prescribed by Fed. R. Civ. P. 59(b), and her notice of appeal had already been filed by the time the district judge considered her motion. Appellant now asks that we remand for a hearing on the motion, instructing the district court to treat it as a motion for relief from judgment under Fed. R. Civ. P. 60(b). This we decline to do, noting that Judge McCurn stated, "for the record," that appellant's trial counsel "very adequately represented" her.

s/ Wilfred Feinberg
WILFRED FEINBERG, Chief Judge

s/ Irving R. Kaufman
IRVING R. KAUFMAN,

s/ Max Rosenn
MAX ROSENN,
Circuit Judges.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX B

Findings of Fact and Conclusions of Law and Judgment of the United States District Court for the Northern District of New York, March 26, 1984.

(COPY)
U.S. DISTRICT COURT
N.D. OF N.Y.
FILED
MAR. 27, 1984
AT ____ O'CLOCK __M.
J.R. SCULLY, Clerk
SYRACUSE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

BHARATI DESAI,

Plaintiff,

-v- 82-CV-1240

TOMPKINS COUNTY TRUST COMPANY,

Defendant.

APPEARANCES: OF COUNSEL:

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NEAL P. McCURN, D.J.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this action brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, et seq., plaintiff Bharati Desai seeks damages against her former employer, defendant Tompkins County Trust Company, on the basis of two claims: (1) that the defendant unlawfully discriminated against her in failing to promote her to the position of "lead teller" in August, 1979; (2) that the defendant unlawfully terminated her employment in retaliation for protesting her discriminatory treatment.

A trial was held on plaintiff's claims in Binghamton, New York, from March 7-9, 1984, and is presently before the court for a decision on the merits. After carefully considering the pleadings, the evidence adduced at trial, and the argument of counsel, the court hereby makes the following findings of fact and conclusions of law pursuant to Rule 52 of the Fed. R. Civ. P.

FINDINGS OF FACT

1. The defendant, Tompkins County Trust Company, is a bank with its main office in Ithaca, New York, and with one of its branches in Dryden, New York.

2. The plaintiff, Bharati Desai, is a native of India and had been a resident of the State of New York for 2½-3 years at the time of the events giving rise to this action.

3. Prior to her taking up residence in the United States, Mrs. Desai had received a law degree from an Indian university and had worked in a bank in India for about 4 months. The banking system in India differs from that in the United States.

4. The Tompkins County Trust Company employs four classes of bank tellers at its branch offices, which differ in terms of seniority, salary, and responsibility. In order of increasing status the classes are: Teller One, Teller Two, Universal Teller, and Senior Teller.

5. It was custom and practice of the branch manager to designate one of the tellers as a "lead teller," who would have additional responsibilities and would, in general, be the "resource person" for the other tellers and fill in for the manager in his absence.

6. Mrs. Desai learned of an opening for the position of Teller One at the Dryden branch of the Tompkins County trust Company, and applied for the position on June 8, 1979. She was offered that position on June 11, and began her training on June 18.

7. During a two-week period beginning June 18, Mrs. Desai was trained at the bank's Ithaca main office branch by Louise Cornish. Mrs. Cornish felt that the plaintiff had no problems in learning her job responsibilities, and that she was "slow but accurate."

8. While the training period was in progress the bank personnel director, Helen Meek, received complaints of a body odor problem attributed to Mrs. Desai, which was allegedly making others on the teller line "sick".

9. Mrs. Meek called the plaintiff to her office and asked her whether she was using deodorant, whereupon Mrs. Desai responded that she bathed regularly and used perfume on her wrist, but that it was against her religion to use deodorant. Mrs. Meek then told the plaintiff that she must use a deodorant. Mrs. Desai felt humiliated by this episode, but began using a deodorant that day and continued to do so for an indeterminate period of time.

10. Mrs. Desai began working as a Teller One at the Dryden branch on July 3, 1979, and continued in that position until her discharge on October 19, 1979.

11. During the course of Mrs. Desai's employment, Branch Manager Richard Lynn and other bank personnel noted problems with her job performance. These problems included occa-

sional body odor; language difficulties in dealing with some customers and co-workers; an abruptness in her tone and manner in dealing with customers; an apparent slowness in handling customer transactions and difficulty in cooperating with co-workers. Throughout the summer, however, Branch Manager Lynn felt that these problems would be resolved with time.

12. At all times, Mrs. Desai was accurate in keeping the accounts at her window and evidenced initiative and a desire to learn.

13. On August 1, 1979, Susan Morse, an American, Caucasian woman, commenced employment at the Dryden branch as a Teller One.

14. Ms. Morse, who had applied for the position the previous May, was then completing her requirements for a Masters Degree in elementary education and had no prior banking experience.

15. From the time that Ms. Morse's resume was first reviewed by Personnel Director Meeks and Branch Manager Lynn in May of 1979, she was considered a prime candidate for the lead teller position at the Dryden branch, which was scheduled to become available once the presently employed lead teller, Pamela Ordway, left in September. However, there was no final determination as to which teller would be designated lead teller until September.

16. Once Susan Morse began working, considerable tension developed between her and Mrs. Desai. The plaintiff believed that Ms. Morse was receiving more training opportunities than she was, and that Morse and other co-workers were attempting to discredit her. The weight of the evidence, including the testimony of teller Barbara White, Richard Lynn, and Helen Meek, indicate that Mrs. Desai was quick to take offense, did not take suggestions or criticism easily, and was particularly unable to get along with Susan Morse or Barbara White.

17. On or about September 12, Mrs. Desai met with the personnel director, Helen Meek, and told Mrs. Meek that she felt she

was a victim of discrimination. Mrs. Meek responded, in substance, that "we at Tompkins County Trust Company do not discriminate" and that "I do not want to hear the word 'discrimination' ".

Mrs. Desai explained that she felt that despite her seniority, Susan Morse was being trained for the position as lead teller, and that she (Mrs. Desai) was not being given equal training opportunities. Mrs. Meek responded, in substance that no decision had been made yet, that Mrs. Desai should be patient and work on improving her skills and on being pleasant to customers.

18. Within the next few days, Mrs. Desai complained to Branch Manager Lynn, that it appeared to her that Susan Morse was going to the position of lead teller even though she (Mrs. Desai) had more seniority. Mr. Lynn responded, in substance, that no decision had been made yet, that she should be patient and work on picking up speed and getting along with her co-workers.

19. It was the policy of the Tompkins County Trust Company to decide, at the end of a 90-day probation period, whether a new employee would be accorded status of "regular employee," thereby entitling the employee, under company policy, to protection from termination except for cause.

20. On September 18, toward the end of Mrs. Desai's probationary period, she went to see Helen Meek to discuss the probation review. At that meeting, Mrs. Desai again expressed dissatisfaction with her co-workers and other matters at the Dryden branch. Mrs. Meek urged her to make every effort to cooperate with her co-workers.

21. In the probationary report dated September 26, Richard Lynn recommended that Mrs. Desai be accorded "regular employee" status. The report states that Mrs. Desai's performance was satisfactory in every one of six categories, and that she had an "excellent attitude" and an "appetite for knowledge and experience." It did note, however, that there were communication problems, but expected those would "improve with exposure and

experience." At the time he filled out this report, Mr. Lynn was aware that Mrs. Desai had previously complained to Mrs. Meek about discrimination, and that there were problems at the Dryden branch involving Mrs. Desai's work performance and attitude, but he sensed that, given time "it would be alright."

22. It was the policy of the defendant to select the lead teller from among the tellers already employed. The selection was made on the basis of length of service and quality of performance.

23. When Pamela Ordway left the band in mid-September, 1979, the lead teller position was given to Susan Morse.

24. There was no direct evidence that Susan Morse was given the position because she is American or Caucasion, or that Bharati Desai was not given the position because she is Indian.

25. During the next month, Mrs. Desai became increasingly resentful of Susan Morse, and uncooperative with her coworkers. Although witnesses had difficulty in detailing incidents, the evidence indicates that Mrs. Desai was competitive, reacted negatively to suggestions, and was quick to take offense. She was particularly unwilling to accept the leadership of Susan Morse.

26. Also during this period there were a number of customer complaints regarding Mrs. Desai, chiefly concerning her slowness in handling transactions, her difficulty in communicating, her apparent abruptness in dealing with customers, and her body odor. Among those who complained were bank customers Shirley Speno, Martha Clark, Roy Draper, and Bill Petrilos. Complaints were made both to Richard Lynn and to the defendant's vice president, Francis Benedict.

27. Although it was the expressed policy of the defendant to warn employees of their shortcomings and give them an opportunity to improve, the only times Mrs. Desai was given notice of same were those set forth in paragraphs 9, 17, 18 and 20 above.

28. On October 19, an accumulation of the problems with Mrs. Desai prompted Mr. Lynn to contact Mrs. Meek to ask that Mrs. Desai be removed from his branch. Mrs. Meek then called Mrs. Desai to her office and informed her that she was being terminated due to body odor and customer complaints.

29. Mrs. Desai was terminated for reasons unrelated to her national origin, and unrelated to her statement of September 12 to Helen Meeks, that she was a victim of discrimination.

CONCLUSIONS OF LAW

The plaintiff has exhausted the administrative procedures provided under Title VII of the Civil Rights Act of 1964 at 42 U.S.C. §2000e-5, and this court has jurisdiction over this action under 28 U.S.C. §1331.

In evaluating the claim of discriminatory nonpromotion and the claim of retaliation, the court follows the method set forth in *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792 (1981) and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 254 (1981). However, a preliminary determination that the plaintiff has proven a *prima facia* case need not be made as the case has been fully tried on the merits. The court need only determine whether plaintiff has met her burden of proving that the defendant intentionally discriminated against her in not promoting her, or that the defendant terminated her employment in retaliation for her opposition to the employer's discriminatory practices. *See United States Postal Service Board of Governors v. Aikens,* ____ U.S. ____ , 103 S.Ct. 1478 (1983).

A. *The Claim of Discriminatory Nonpromotion*

Under the *McDonnell-Douglas* method, as applied to claims of discriminatory nonpromotion, the court must first determine whether plaintiff has shown (1) that she belongs to a protected class; (2) that she applied for, and was qualified for, a position for

which her employer was seeking applicants; (3) that despite her qualification, she was rejected; and (4) that after her rejection, the position remained open and the employer continued to seek applicants of comparable qualifications. *Burdine, supra,* 450 U.S. at 253 n.6; *Sweeney v. Research Foundation of S.U.N.Y.,* 711 F.2d 1179, 1185 (2d Cir. 1983).

Plaintiff, a native of India, is manifestly a member of a class protected by Title VII.

It is equally clear that plaintiff applied for the position of lead teller, since she repeatedly expressed her desire for and expectation of that position to the branch manager and the personnel director. Moreover, despite her shortcomings in performance and attitude, the court finds that the plaintiff was qualified for the position.

There was some evidence adduced at trial that Susan Morse had been selected for the position of lead teller as early as May, 1979. However, as set forth in the findings of fact above, the court finds that the position was not filled until Pamela Ordway left in mid-September. The plaintiff was therefore considered, but rejected, for the position. Although the rejection of Mrs. Desai occurred simultaneously with the selection of Susan Morse for the position, that circumstance would not insulate the defendant from liability if the decision was a result of intentional discrimination; the *McDonnell-Douglas* criteria are not to be applied that rigidly. *Id,* 411 U.S. at 802 n.13.

Next, the court must determine whether the plaintiff has articulated a legitimate, nondiscriminatory reason for the employment decision. Although the court has rejected defendant's contention that the position had been filled in May, the defendant has nevertheless articulated a legitimate nondiscriminatory reason. Mrs. Desai exhibited serious shortcomings in performance and attitude. Her occasional body odor, her communication difficulties, her abruptness in tone and manner in dealing with customers, an apparent slowness in handling transactions, and her difficulty in cooperating with co-workers, the court finds, were ample reason, in accumulation or in combination, to account for

the defendant's selection of another for promotion.

Finally, the court must consider whether the plaintiff has proven that articulated reasons are pretextual. This may be shown "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine, supra,* 450 U.S. at 256.

In this instance, plaintiff has proffered no direct proof that the decision to appoint Susan Morse lead teller instead of her was the product of a discriminatory motive.

Nor has plaintiff demonstrated that the employer's proffered explanation is unworthy of credence. Although the defendant's evidence of Mrs. Desai's faults was, in part, short on factual details, and although there is contrary evidence such as the September 26 probation report which noted that Mrs. Desai was satisfactory and had an "excellent attitude", the weight of the evidence decidedly indicates that the decision not to appoint Mrs. Desai is attributable to flaws in her performance and attitude, and not to her national origin.

Plaintiff has failed to persuade the court, by a preponderance of the evidence that the defendant intentionally discriminated against her by rejecting her for the position of lead teller on account of her national origin.

B. *The Claim of Retaliatory Termination*

To establish her claim of retaliatory termination, plaintiff must show:

> fist, protected participation or opposition under Title VII known by the alleged retaliator; second, an employment action of actions disadvantaging persons engaged in protected activities; and third, a causal connection between the first two elements, that is, a retaliatory motive playing a part in the adverse employment actions. *Grant v. Bethlehem Steel Corp.*, 622 F.2d 43, 46 (2d Cir. 1980).

Mrs. Desai's complaint of September 12, that she was a victim of discrimination, constitutes a protected activity because it is op-

position to a practice made unlawful by Title VII. 42 U.S.C. §2000e-3(a). That complaint was communicated to branch manager Richard Lynn; thus the protected activity was known to the alleged retaliator. The termination of plaintiff's employment on October 19 supplies the element of adverse action.

A causal connection could be inferred, for *prima facie* case purposes, by the fact that her termination occurred within a relatively short period after her protected activity. *Grant, supra,* 622 F.2d at 46. However, the defendant has demonstrated, to the court's satisfaction that the termination of Mrs. Desai was wholly promoted by the legitimate, non-discriminatory reasons discussed previously: dissatisfaction with Mrs. Desai's job performance and attitude. Although perhaps no single factor was determinative, the evidence indicates that recurrent, and in some instances increasing problems caused by Mrs. Desai's inability to get along with her co-workers, unwillingness to accept authority, language difficulties, abruptness, slowness, and body odor prompted her termination on October 19. Her September 12 complaint of discrimination, which occurred two weeks before her favorable probationary report, and five weeks before her termination, played no evident role in her subsequent termination.

Accordingly, it is hereby ORDERED, that

1. Judgment is granted to the defendants dismissing the plaintiff's complaint in this action.

2. Both plaintiff's and defendant's requests for attorneys fees are denied.

3. Each party shall assume its own costs.

IT IS SO ORDERED.

Dated: March 26, 1984
Syracuse, New York

s/ Neal P. McCurn

Neal P. McCurn
U.S. District Judge

APPENDIX C

Oral argument and decision of District Court (N.D.N.Y.) denying plaintiff's post-judgment motion, May 8, 1984.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BHARATI DESAI,

Plaintiff

-against- 82-CV-1240

TOMPKINS COUNTY TRUST COMPANY,

Defendant

Transcript of the proceedings held at the U.S. Courthouse, Syracuse, New York, on the 8th day of May, 1984, before Hon. Neal P. McCurn, U.S. District Court Judge.

APPEARANCES:
BHARATI DESAI
Plaintiff, pro se

TREMAN & CLYNES
Attorneys for Defendant
by: EDWARD C. HOOKS, ESQ., of Counsel
(Daniel E. Mayo, C.S.R.)

THE CLERK: Bharati Desai versus Tompkins County Trust Company. Appearances, please.

MR. HOOKS: Edward C. Hooks, Treman and Clynes, for the defendant.

MRS. DESAI: Bharati Desai, pro se. Your Honor, plaintiff will make a very brief statement.

THE COURT: All right.

MRS. DESAI: First of all, pardon me if I make any mistake, as I'm appearing in court for the first time and representing myself. The plaintiff, in this motion for a new trial, has shown to the Court reasons for being slightly late in filing her motion and has cited cases where such motion, even though late, have been granted and heard by the Court.

The plaintiff has also told the necessary grounds for the new trial and cited cases where new trials were granted by the Court. At this stage plaintiff is not in a position to show to the Court all the evidence and testimony and the arguments regarding this case. If she were to do so she would have to open her entire case which she would like to present upon a new trial.

Plaintiff also requests to the Court that the defendant be asked to provide evidence that the plaintiff has been demanding for a long time so that the plaintiff can prepare for a new trial. Plaintiff has supplied to the Court proper legal grounds for granting of a new trial on the strength of

papers, legal arguments, affidavits and exhibits. Therefore I, the plaintiff, Bharati Desai, respectfully request to the Court that her motion for a new trial be considered and be granted. Thank you.

THE COURT: Thank you, Mrs. Desai. Mr. Hooks?

MR. HOOKS: Your Honor, very briefly. Initially, of course, as is mentioned in our memorandum of law, the motion for new trial was served upon us 14 days after entry of the judgment. We contend that from a jurisdictional standpoint — well, from the standpoint of Rule 59 of the Federal Rules of Procedure the Court is without jurisdiction. Therefore, even to consider this motion, because it is late, assuming arguendo that you would consider it, I think that looking at the "evidence" that is referred to in the affidavit or the unsworn statement of Mrs. Desai, it is

not the type of evidence which warrants the granting of a new trial. There is no showing that any of this purported evidence was newly discovered, nor is there any showing that the evidence would be other than such that would tend to impeach or go to the credibility of the various witnesses that we heard during the course of the three day trial that we had in Binghamton. It is not the type of evidence, in short, your Honor, that would justify the grant of a new trial.

THE COURT: I'm not going to decide this motion on that basis, in any event. Any other points you want to make?

MR. HOOKS: The only other point, I think that the

requirement of the party moving for a new trial is to demonstrate the reason why, and it just simply hasn't been done. This purported misbehavior on the part of Mr. Benjamin during the course of a recess, and so on, I don't think there has been an adequate showing that any of that deprived her of a fair trial.

The only other thing I would emphasize, your Honor, is that from our perspective if Mrs. Desai has a quarrel with Mr. Benjamin's preparation for the trial or the manner in which the trial was presented I would say that is for her to bring up with Mr. Benjamin, unfortunately. We did everything as was required of us. Anytime there was a discovery demand we complied. We had, as I say, a dozen or thirteen depositions, whatever the case might be. We put in an awful lot of time, a lot of effort and a lot of expense.

Ms. Polimeni, during the course of that pretrial conference we had in Binghamton in your chambers, indicated that she was ready to go to trial, they were ready to go, and now because of the result going back and saying, well, we really weren't ready to go trial and therefore we want a new trial.

THE COURT: All right. Thank you.

MR. HOOKS: Thank you, your Honor.

THE COURT: Do you have something further you want to say?

MRS. DESAI: Yeah, just also, your Honor, if you

(Daniel E. Mayo, C.S.R.)

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see, your Honor, the letter dated February 1st by Mr. Ronald Benjamin, and affidavit, letter dated — there were four letters regarding — four letters submitted to the defendant for the documents which we wanted, the backside of the chart and the backside of the slip we wanted, monthly statement, we wanted the teller stamp, and none of them has been provided by the defendant during the time of discovery, at the time of trial, and still today we don't have that documents.

THE COURT: Well, Mrs. Desai, I read all your papers on this. You submitted a volume of papers, and I read them and reviewed them. But I can't even reach that point because we have the question of timeliness of this motion. You filed an appeal. You can raise these things in that respect. But motions for a new trial are governed by Rule 59 of the Federal Rules of Civil Procedure, which provides in subparagraph (b) that "a motion for a new trial shall be served no later than ten days after the entry of judgment." Rule 6(b) provides that the Court "may not extend the time for taking any action under Rule 59(b), included, except to the extend and under the conditions stated in them."

Thus, the ten day period of Rule 59(b), unlike most time limits in the Federal Rules, is mandatory and can not be enlarged. Tarlson v. Exxon, 688 F.2d 973, Fifth Circuit, cert. denied United States Supreme Court, 1983. See also Serling v. Chemical Bank, 511 F.2d 1030, Second Circuit, 1975, wherein the

(Daniel E. Mayo, C.S.R.)

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Court held that the ten day limit of Rule 59(e) could not be enlarged. See also Spurgeon v. Delta Stemship Lines, 387 F.2d 358,

in accord, and see generally Wright & Miller Federal Practice and Procedure, Section 2812 at 83. "The time limit on a new trial motion is extremely important. The time can not be enlarged by the Court."

There are some case law exceptions to this ten day limit which were recognized in response to extraordinary circumstances. Thompson v. INS, 375 U.S. 384, 1964. Parise v. Greer, 685 F.2d 1015, Seventh Circuit, 1982. In both cases there the movant unwittingly lost their right of appeal bacause they filed untimely Rule 59 motions which were not found to be untimely until after the time to file an appeal had expired. In those cases the time to file an appeal had expired. In this instance the plaintiff here has filed a notice of appeal that will be timely, regardless of the disposition of this motion. Thus Mrs. Desai's late filing under a Rule 59 motion does not fall within the narrow exception which I just discussed.

The plaintiff's reasons for filing late might be convincing if the Court had discretion in this matter. Rule 59 and Rule 6(b) and the case law thereunder indicate that the Court has no such discretion. Therefore the Rule 59 motion must be denied, and I so order. And I direct you to submit an order in that regard.

MR. HOOKS: Thank you, your Honor.

(Daniel E. Mayo, C.S.R.)

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MRS. DESAI: Can I say something? First of all, I request the Court to consider that I never received the notice of documenting of judgment, neither from my attorney, not even today. And the attorney which I went, approached, has never told me that I should file a motion after the date of entering the judgment.

THE COURT: But you see, you were represented by an attorney at all times. And, again, that notice of denial was sent out — I think the Clerk's records reflect it was sent out, and that complied with the statute. And, again, that is a matter between you and your attorney. If he didn't — I can't comment on that.

MR. DESAI: Can I speak for a minute?

THE COURT: Yes, Mr. Desai.

MR. DESAI: Your Honor, what has happened over here, as you have noticed, you have read the papers. I myself approached Mr. Rosenthal, Weissman, and the attorney's office on a Thursday. We were still in time on that day. He keeps the documents, the pleadings, as well as the judgment, and does not answer us until Monday at five o'clock. That was the day that actual time expired, Monday at five o'clock, her time to file the motion expired.

THE COURT: I don't know anything about that, who Mr. Rosenthal is or anything like that, but the fact is you didn't file timely and I have no power under these narrow

(Daniel E. Mayo, C.S.R.)

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exceptions which I quoted you. If you were prejudiced by your notice of appeal being untimely, then I could take it into consideration. But you did properly file your notice of appeal. These matters you can take up on your appeal.

I might observe, although it is not a part of the decision in this case, I want to make that clear, but I observed the trial of this case and sat through it. And I'm not at all convinced that you didn't receive very good representation in that case. You know, I have sat on hundreds of cases and tried hundreds of them, and I think I can judge when a lawyer is performing in a capable manner. And I think Mr. Benjamin, I'm just saying for the record, very adequately represented you.

All right. That is my decision.

MR. HOOKS: Thank you, your Honor.

CERTIFICATE

I, DANIEL E. MAYO, an Official Court Reporter for the United States District Court in and for the Northern District of New York, do certify that the foregoing is a true and accurate record of the proceedings held at the time and place as noted in the heading hereof.

s/ Daniel E. Mayo

(Daniel E. Mayo, C.S.R.)

APPENDIX D

Order of District Court (N.D.N.Y.) denying plaintiff's post-judgment motion, May 17, 1984.

D-1

(COPY)
U.S. DISTRICT COURT
N.D. OF N.Y.
FILED
MAY 23, 1984
AT ___ O'CLOCK __M.
J.R. SCULLY, Clerk
SYRACUSE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BHARATI DESAI,

Plaintiff,

-v- 82-CV-1240
Judge McCurn

TOMPKINS COUNTY TRUST COMPANY,

Defendant.

Plaintiff having moved this Court for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure,

NOW, upon reading and considering the notice of motion of Bharati Desai, *pro se,* dated April 18, 1984 and the exhibits annexed thereto; the supplementary affidavit of Ms. Desai sworn to April 19, 1984 and the exhibits annexed thereto, submitted in support of plaintiff's motion, the affidavit of Edward C. Hooks sworn to April 19, 1984 and exhibits annexed thereto; the supplemental affidavit of Mr. Hooks sworn to May 3, 1984, and exhibits annexed thereto, submitted in opposition to the motion, and Ms. Desai's statement of May 3, 1984 submitted in answer to Mr. Hooks affidavit of April 19, 1984 and her supplemental memorandum of law submitted in support of the motion for new trial filed May 8, 1983, all of the foregoing documents having been heretofore filed with the Clerk of this Court and upon hearing Bharati Desai, *pro se,* in support of the motion and the Treman and Clynes office of Harris, Beach, Wilcox, Rubin and Levey, Edward C. Hooks, of counsel, in opposition thereto, it is,

ORDERED that plaintiff's motion for new trial be, and the same hereby is, denied in all respects because it was not served within the time limits prescribed by Rule 59(b) of the Federal Rules of Civil Procedure.

Dated: May 17, 1984
Syracuse, NY

s/ Neal P. McCurn

Neal P. McCurn
U.S. District Judge

APPENDIX E

Statutory Provisions Involved.

STATUTORY PROVISIONS INVOLVED

Section 2000e-2 of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2 provides in pertinent part:

(a) Employers. It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

Section 2000e-3 of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3 provides in pertinent part:

(a) Discrimination on account of opposition to unlawful practices or participation in investigation, proceeding, or hearing. It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this title . . .

U.S.C. Federal Rules of Civil Procedure, Rule 52 (a) provides in pertinent part:

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury . . ., the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; . . Findings of fact shall not be set aside unless clearly erroneous, . . .

U.S.C. Federal Rules of Civil Procedure, Rule 59 (a) and (b) provide in pertinent part:

Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues . . . (2) in an action

tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

U.S.C. Federal Rules of Civil Procedure, Rule 60 (b) provides in pertinent part:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time . . .

APPENDIX F

Plaintiff's Complaint, dated November 2, 1982 (exhibits deleted).

F-1

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF NEW YORK

BHARATI DESAI,

Plaintiff,

-v-

TOMPKINS COUNTY TRUST COMPANY,

Defendant.

COMPLAINT

Demand for a Jury Trial

PRELIMINARY STATEMENT

1. This is an action brought by the plaintiff to challenge the defendant's failure to promote the plaintiff due to unlawful discrimination based on race and national origin, and for the unlawful termination of the plaintiff as a direct result of and in retaliation for the plaintiff lodging a complaint regarding defendant's discriminatory promotion practices. Plaintiff contends that defendant failed to promote the plaintiff solely because of her race and national origin, in violation of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e et. seq.)

JURISDICTION

2. The jurisdiction of this Court is invoked pursuant to 42 U.S.C. §§ 2000 e-5(a)(e), this being an action for the protection of civil rights guaranteed by the Act.

3. Plaintiff has exhausted all necessary administrative requirements, having filed with both the New York State Division of Human Rights and the Equal Employment Opportunity Commission. Conciliation was unsuccessful and plaintiff was informed that she now had a right to bring suit in this Court.

PARTIES

4. Plaintiff, Bharati Desai, is a resident of the State of New York, where she has resided for approximately five years and nine months. She is a native of India.

5. Defendant, Tompkins County Trust Company, is a financial institution, doing business in the State of New York.

STATEMENT OF FACTS

6. Plaintiff commenced employment with the defendant on or about June 18, 1979, as a Teller I for its Dryden branch. Plaintiff's duties included processing customer account transactions, balancing the cash drawer, issuing food stamps and money orders, and the like.

7. Prior to her employment with the defendant, plaintiff had received a law degree from an Indian university and had had prior banking experience.

8. Plaintiff satisfactorily completed a two week training period at defendant's main Ithaca branch, after which time she assumed her responsibilities at the Dryden office.

9. After training, plaintiff satisfactorily completed her three month probationary period on or about September 21, 1979, at which point, plaintiff was evaluated by the branch manager, Richard Lynn, who found the plaintiff to be "satisfactory" in the areas of quality of work, quantity of work, personality, personal appearance, attendance and dependability, and who recommended that the plaintiff be continued as a regular employee.

10. On his written evaluation of the plaintiff, Richard Lynn indicated that the plaintiff was "definitely above average" compared to other employees, and stated that she had an "excellent attitude and appetite for knowledge and experience, willing to adapt, communication (language terminology, etc.), occasional confusion, but will improve with exposure and experience."

11. At all times herein mentioned plaintiff fully and satisfactorily performed her employment responsibilities.

12. At or near the end of August, 1979, plaintiff learned that the position of Head Teller was to become vacant in the near future.

13. Plaintiff was by far the most qualified for the position and was next in line, in terms of seniority and experience, for the job.

14. Upon information and belief, defendants hired a white woman who was less qualified than the plaintiff to fill the position of Head Teller.

AS AND FOR A FIRST CAUSE OF ACTION

15. Plaintiff repeats and realleges Paragraphs 1-14 as if the same were set forth more fully herein.

16. Defendant's refusal and/or failure to promote the plaintiff to "Head Teller", even though she had more seniority and experience than the white woman who was given the position, was invidious discrimination based on national origin, race and color, in violation of Title VII of the Civil Rights Act of 1964.

AS AND FOR A SECOND CAUSE OF ACTION

17. Plaintiff repeats and realleges Paragraphs 1-16 as if the same were set forth more fully herein.

18. On or about September 18, 1979, plaintiff complained to her immediate superviser that she felt she had been discriminated against because of her national origin, race and color.

19. Plaintiff was cautioned by her superviser not to use the word "discrimination" and, thereafter, on or about October 19, 1979, plaintiff was summarily terminated.

20. Defendant's summary dismissal of the plaintiff, occurred on the heels of the lodging of plaintiff's discrimination com-

plaint, and was in retaliation therefor.

21. Plaintiff had at all times performed her employment responsibilities in a satisfactory fashion, and the pretextual nature of the reasons given for plaintiff's termination is evidenced by the fact that all of the documentation supplied by the defendants to justify the said termination, was generated after the date that plaintiff left defendant's employ.

22. Further, the fact that defendants expunged the name of alleged dissatisfied customers from the said documentation, after one of the so-called dissatisfied customers called the bank objecting to the use of his name, and stating that he had never complained about the plaintiff's job performance, is clear and convincing evidence of the pretextual nature of the defendant's purported reasons for terminating the plaintiff.

23. The aforesaid termination, and the retaliation for the filing of a discrimination complaint against the defendant, and all of the activities complained of herein, constitutes an unlawful employment practice, in violation of Title VII of the Civil Rights Act of 1964.

24. The aforesaid unlawful activities were willful and malicious.

25. As a result of the aforesaid unlawful activities, plaintiff suffered emotional distress and great mental anguish.

26. As a further result of the defendant's unlawful activities, plaintiff sustained damages in the amount of all wages, incremental pay increases, and other benefits she would have received, had she not been unlawfully discriminated against.

27. Plaintiff is anxious and eager to work, and is suffering from depression as a result of not being employed.

28. Plaintiff suffers irreparable harm and will continue to suffer irreparable harm unless the relief sought herein is granted.

29. Plaintiff has no adequate remedy at law.

AS AND FOR A THIRD CAUSE OF ACTION
(Pendent state claim-breach of contract)

30. Plaintiff repeats and realleges Paragraphs 1-29 as if the same were set forth more fully herein.

31. Throughout the term of plaintiff's employment, which commenced on or about June 18, 1979, there was in full force and effect an employment agreement/policy which set forth the terms and conditions of employment.

32. Plaintiff at all times duly performed all the terms and conditions of the said contract of employment on her part.

33. Pursuant to the terms of the said agreement/policy, the primary consideration of the defendant in hiring or promoting must be the applicant's qualifications, including job-related qualifications, relevant experience, and length of service. Defendant agreed to administer its hiring and promotion procedure without regard to race, color or national origin, inter alia.

34. At or around the beginning of September, 1979, defendant promoted a white woman with less experience and seniority than the plaintiff herein, to the position of Head Teller, in contravention of the aforesaid terms of defendant's employment contract.

35. Furthermore, pursuant to the terms of the said employment agreement, immediate dismissal of defendant's employees is prohibited, in the absence of certain specified conduct by the employee. (A copy of defendant's termination policy is annexed hereto as Exhibit "A").

36. On or about October 19, 1979, plaintiff was summarily terminated from her position with the defendant.

37. At no time did plaintiff engage in dishonesty, use of alcohol or illegal drugs on premises, breach of confidentiality, and/or failure to conform to stated bank policy, and at no time did defendant accuse plaintiff of any of the above stated activities.

38. In the absence of any allegation that plaintiff engaged in

any conduct which would justify immediate dismissal, plaintiff's summary termination by the defendant constituted a breach of the aforesaid contract of employment.

39. On the aforementioned date defendant wrongfully terminated the plaintiff, without just cause, and since that time defendant has prevented plaintiff from performing her part of the said employment agreement, although plaintiff duly tendered her services to defendant and has ever been and is still ready and willing to perform said services according to the said employment agreement.

40. By reason of the foregoing plaintiff has been damaged in the sum of $50,000.00.

WHEREFORE, plaintiff respectfully requests that this Court:

1. Award plaintiff damages in an amount equal to her salary and other benefits she would have received, but for the unlawful activities complained of herein.

2. Award plaintiff an amount equal to her salary and other benefits she would have received, but for the unlawful activities complained of herein, as liquidated damages.

3. Award the plaintiff $250,000.00 in compensatory damages for her first cause of action.

4. Award the plaintiff $250,000.00 in compensatory damages for her second cause of action.

5. Award plaintiff $50,000.00 in compensatory damages for her third cause of action.

6. Order the defendant to reinstate plaintiff to her position as Head Teller in defendant's Dryden branch, with all right retroactive to her last date of employment.

7. Award plaintiff reasonable attorney's fees together with the costs and disbursements of this action.

8. Award plaintiff such other and further relief as the Court deems proper under the circumstances.

DATED: November 2, 1982

s/ Ronald R. Benjamin

RONALD R. BENJAMIN
Attorney for Plaintiff
Suite 402 Midtown Mall
15 Chenango Street
Binghamton, New York 13901
(607) 772-1442

APPENDIX G

Plaintiff's post-judgment Motion Papers, dated April 18, 1984, April 19, 1984 and May 3, 1984 (exhibits deleted).

BHARATI DESAI

Plaintiff,

-v- 82-CV-1240

TOMPKINS COUNTY TRUST COMPANY

Defendent.

NOTICE OF MOTION FOR A NEW TRIAL

To Attorneys for Defendent
TREMAN & CLYNES
HARRIS BEACH WILCOX RUBIN
and LEVEY
Attorney for defendent
121 E. Seneca Street
P.O. Box 580
Ithaca, New York 14850

Motion for new trial returnable May 8th, 1984 at 10 A.M. U.S. Courthouse, Syracuse, New York

Hon. Judge Neal P. McCurn (D.J.)

Pro-se BHARATI DESAI
10 Greystone Dr.
Dryden, N.Y. 13053
(607) 844-4566

UNITED [STATES] DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

BHARATI DESAI,

Plaintiff,

-v- 82-CV-1240

TOMPKINS COUNTY TRUST COMPANY,

Defendent

THIS IS A MOTION FOR NEW TRIAL

In this above action judgement by Honorable justice McCurn was entered on April 4, 1984. The plaintiff has not yet received the notice of entering this judgement. The plaintiff realises today that looking at the dates the motion is filed two days late.

The plaintiff, files this motion for a new trial due to the fact that plaintiff was, due to misunderstanding was miss advised by the court upon her request to dismiss her attorney and adjurn the trial for a little while, so that she may secure a new attorney or represent herself.

Her attorney had missbehaved at the recess, threatened her that he would not issue the subpoenas to the key witnesses whose testimonies would have clearly contradicted the testimonies of the defendents witnesses. He told her (plaintiff) that, he was going to put her on and she will see what would happen.

Your Honor, you yourself were witness at the trial, to the condition; emotional and otherwise of the plaintiff at and during the trial.

Hereto annexed as exhibit No. 1 for plaintiff, is a letter from her attorney Mr. Ronald R. Benjamin, tone of which his attitudes towards the plaintiff, He writes,

> "Since you indicated at trial that you would like to seek another attorney, I am sure you will want another attorney to handle your appeal."

Also annexed is exhibit No. 2. This is a report of medical examination conducted by the defendents [physician] on June 21, 1979. This report clearly, without a shadow of a doubt indicates that Mrs. Desai the plaintiff had no physical or mental health problem.

Mrs. Meek defendents perenell director on June 22nd alledges the plaintiff of having a body odor! This is in intself clear contradiction to the openion of the physicial who is an MD.

Similar contradictions and other facts would have certainly surfaced if all the deposed witnesses had bee subpoenad.

I, the plaintiff, BHARATI DESAI, hereby, respectfully request your honor to give due consideration to this motion for a new trial so that justice may be served as well as preserved.

Additionally: Annexed also are exhibit No. 3, No 4, and No. 5 all of which are dated June 26, 1981. These exhibits indicates that Mrs. Meek, personell director of the defendent bank confirmed on that day that Miss Morse, not only surpassed the plaintiff but also surpassed two non-indian, white female tellers named Pamela Ordway and Barbara White for promotion to head teller.

The testimony of Mrs. Meek at trial indicated that, Pamela Ordway was resigning thus creating the position and Mrs. Barbara White has testified that she was offered the position but she rejected the position.

This raises a question why one set of story at the New York State division of human rights and an entirely different story of the fact at a trial in federal court.

Respectfully Submitted,
/s/ Bharati Desai
April 18th 1984

BHARATI DESAI
10 Greystone Dr.
Dryden, N.Y. 13053
(607) 844-4566

U.S. DISTRICT COURT
N.D. OF N.Y.
FILED
APR 19 1984
AT ____ O'CLOCK __M.
J.R. SCULLY, Clerk
SYRACUSE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

BHARATI DESAI, Plaintiff,	Supplementary Affidavit
-v-	File No.
TOMPKINS COUNTY TRUST COMPANY, Defendant.	82-CV-1240

STATE OF NEW YORK)
COUNTY OF CORTLAND) : ss.:

BHARATI DESAI, being duly sworn, deposes and says:

1. I am the plaintiff in the above-entitled action and make this supplementary affidavit in support of my motion dated April 18, 1984 for a new trial on grounds that I was deprived of my rights to be properly represented by adequate counsel of my own choosing at the trial on March 7-9, 1984.

2. In October 1982, I retained Ronald Benjamin, Esq. to represent me in this action. Between that date and March 6, 1984 at 5:30 P.M., I never saw Mr. Benjamin again and only spoke briefly once or twice with him on the telephone. Instead, Eleanor Polimeni, an attorney in Mr. Benjamin's office, conducted all pretrial discovery and had gained my trust and confidence, staying overnight at my home after depositions of witnesses. On March 6, 1984 at 7:45 A.M., I received a telephone call from Mr. Benjamin's office that the trial was scheduled for the next day. This information came as a shock as I had informed the office previously that that week was extremely difficult as my

husband had to work all week. I was additionally shocked at 11 A.M. of that day when I found out that the transcripts of the depositions of four witnesses taken on January 27, 1984 had not been picked up by Mr. Benjamin's office. My husband had to go to Ithaca that afternoon and obtain the transcripts.

3. When I met with Mr. Benjamin in his office at 5:30 P.M. on March 6, I was in his office between approximately thirty to forty-five minutes during which time he was constantly taking telephone calls and otherwise being interrupted. At the end of the conference, I felt that he really did not understand my case and was not prepared. That evening I became so upset thinking of the trial the next day and Mr. Benjamin's representation of me that I became violently ill. My husband called Ms. Polimeni's house at approximately 10:48 P.M. to tell her that I could not go ahead with the trial. Mr. Benjamin called back and said he was ready and prepared for trial and not to worry.

4. The next morning, March 7, I went to Mr. Benjamin's office at approximately 10:30 and again only saw Mr. Benjamin very briefly during which time we were constantly interrupted. The trial started that afternoon with the testimony of Helen Meek. The next morning, March 8, Mr. Benjamin called additional witnesses. It was obvious that he was not familiar with the depositions of these witnesses as he did not impeach their testimony when they contradicted their prior testimony. Ms. Polimeni was constantly passing him notes with references to the depositions for use in the examination of the witnesses, but he refused to make use of the depositions stating, at one point, that he was not going to use them.

5. During a recess in the morning of the second day, March 8, Mr. Benjamin told me that the defendant would pay $15,000 in back pay in settlement of the case. When I told him that I would not accept the offer, he became belligerent and his tone nasty.

Then he threatened me that he would put me on the stand and "finish it all up today," indicating that he was not going to subpoena the other witnesses we had discussed previously.

6. Mr. Benjamin's tone and attitude confirmed my prior misgivings about his lack of preparation for the trial. When we went back into the courtroom and the trial was about to resume, I asked the Court if I could approach the bench and indicated that I wanted to know my rights. The Court apparently thought that I meant my rights concerning the merits of the case or the proposed settlement, and informed me that I had to speak through Mr. Benjamin and could not address the Court directly. I then informed Mr. Benjamin that I wanted to discharge him and engage another attorney and requested an adjournment of the trial for that purpose. It was my intention to have Ms. Polimeni take over the presentation of my case or if she could not or would not do so then I would represent myself. Mr. Benjamin and the attorney for the defendant then approached the bench and held a conference with the Court. Mr. Benjamin returned after the bench conference and informed me that the Court would not grant a postponement and would dismiss my case unless I continued with the trial. He also warned me not to address the Court again without first speaking to him.

7. During the balance of the trial, Mr. Benjamin continued to be abusive and threatening towards me, refusing to

subpoena witnesses that he had previously stated he would call. His direct testimony of me was short and ineffective as if he intended to show me who was in charge.

8. The end result was that my case was presented by an attorney who was not prepared for the trial, who took little or no interest in preparing me for the trial, who was threatening and abusive to me during the proceedings, who failed to make use of depositions and other evidence which would have aided my cause, and

who refused to call witnesses necessary for the proper presentation of my case. When I attempted to gain the Court's assistance in discharging Mr. Benjamin, I was not permitted to speak to the Court and explain what I wanted and why I wanted it. As a consequence, I was deprived of a fair trial presented by adequate counsel of my own choosing.

9. Exhibit "1" attached to my motion papers is a copy of a letter dated March 28 from Mr. Benjamin enclosing a copy of the Court's Decision and informing me that the last day to appeal is April 26, 1984. Since I received the Decision, I have been attempting without success to obtain an attorney to represent me on an appeal. I was under the belief that the appeal would include the refusal of the Court to allow me to discharge Mr. Benjamin. I am now informed that such an argument should be made by means of a motion addressed to the Trial Court. On April 18, I went to the Clerk's Office to determine how to take an appeal and found out that a judgment was entered in the Clerk's Office on April 4. This was the first time that I learned that a judgment had been entered (I have not yet received any notice or copy thereof) and the first time that I learned that a motion

for a new trial must be made within ten days of entry of the judgment. I respectfully request the Court to consider my motion and to grant me a new trial.

_____

BHARATI DESAI

Sworn to before me this
day of April, 1984.

_____

Notary Public

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BHARATI DESAI,

Plaintiff,

-v-

TOMPKINS COUNTY TRUST COMPANY,

Defendant.

PLAINTIFF's ANSWER TO
DEFENDENT's ATTORNEY's
AFFIDAVIT DATED
APRIL 19, 1984 AND
DEFENDENT's
MEMORANDUM OF LAW REGARDING
PLAINTIFFS MOTION FOR A NEW TRIAL

BHARATI DESAI
10 GREYSTONE DR.
DRYDEN, N.Y. 13053
607/844/4566

STATEMENT OF FACTS

1. This Civil Rights action under title VII was tried before the Court on March 7, 8, and 9, 1984. The plaintiff's attorney was not ready for the trial and the defendent's attorney had not provided to the plaintiff's attorney the doccuments requested by her attorney until the trial and also until now. These documents were requested by Ms. Polimeni in her letter to Mr. Hooks on December 9, 1983, by Mr. Benjamin in his letter to Mr. Hooks dated January 9, 1983 and once again the same requests were made by Ms. Polimeni to Mr. Hooks while they were under oath on January 27, 1984, prior ro deposition of Mrs. Anne Ostrander. The

plaintiff annexes copies of these letters and pages from the said deposition as Exhibit A, Exhibit B and Exhibit C respectively marked. These requests were

A. Back side of Mrs. Clark's both the deposit slips which she made at the Dryden branch of the bank on Octomber 18, 1979.

B. Back side of the check that Mrs. Clark wrote to Jan McClain on Oct.omber 18, 1979 after 3:30 P.M. and after opening her new account, the check No. is 99.

C. Doccumentation showing teller transactions on a daily basis and on monthly basis Mrs. Lelik has testified that record of this is kept by the bank branches.

D. Teller tapes showing sequential transactions on a daily basis, one copy of these tapes are kept at the branch and a second copy goes to the main office.

The above facts are true and are in direct contradiction to Mr. Hook's affidavit (paragraph 13) written under heading of "CONCLUSION" The affidavit therefore is nothing but falls statement and should be treated as such, and dismissed and the court should consider appropriate action.

2. Mr. Hook's writes in his affidavit that there were 13 depositions taken, the fact is that there were only 12 deposions taken, thus this again is a falls statement in an affidavit. Further plaintiff paid for 10 of the 12 depositions and therefore it was the plaitiff conclusively spend time, energy and money and not the defendent.

3. Every witness, that the plaintiff demanded of her attorney to produce at the trial, her attorney after the recess on March 8, 1984 morning, told that he would not call them, which he had agreed to do so on an earlier date. These witnesses are the once which were requested by Mr. Benjamin in his letter of Jan 9, 1984.

4. Plaintiff has never said that the trial, itself was an emotional experience, but waht the plaintiff is saying that the circumstances under which she had to be at the trial, resulted in her emotinal condition at the trial and this condition further detoriated after the recess of 8 th morning. Plaintiff was advised a day before the trial of the trial date by her attorney, she was advised that the depositions had not yet been in the hands of the plaintiff, plaintiff had informed Ms. Polimeni on or around February 26, 1984 that the week of March 5 th was the week when not even was it possible to depose Mr. Desai, since his coligue had asked for a vacation that week and plintiff refered to Mrs. Polimeni on this day that Mr. Hooks in his conversation to Ms. Polimeni on January 27, 1984 had indicated that he wished to depose Mr. DEsai sometime before the trial. Thus coclusively once again Mr. Hooks paragraph 11, is also incorrect and that is an affidavit.

5. Mr. Hooks affidavit indicates that plaintiff's motion for a New Trial was four days late. The officer at the courts Clerk's office called Utica, found the date when the judgement was entered then counted the days in the calendar and told the plaintiff that the motion was due to be timely on the 16 th of April 1984. The days when counted are only the weekdays or working days to be counted. The fact thus remains that the motion is only 2 days late in filing.

6. The plaintiff's former counsel Mr. Benjamin has not yet sent her the notice of docketing the judgement. Plaintiffs husband approached Mr. Elijah Huling esq. of the law offices of Hiscock, Lee, Rogers, Henley and Barclay in Syracuse on 11 th April 1984, Mr. Huling finding some conflict of interest, called Mr. Rosenthal esq. of tha law oofice of Heath, Rosenthal and Weissman, in tern my husband spoke to Mr. Ronald Van Norstrand of that office on the 12 th April, discussed Motion as well as appeal. Mr. Van Norstrand inform the plaintiff and her husband at around 5 PM on April 17 th over atelephone that the motion was due on 6 th April and that they could not handle the appeal. Mr. Van Norstrands letter dated 17 th April 1984 is annexed

as exibit D. The plaintiff here wishes to establish to the court that she did try her best to obtain the correct information needed to file the motion for a New Trial and lastly when she could not obtain a single correct answer from any of the attorneys that she approached, she did infact approached the Clerk of the court. Therefore the plaintiff respectfully and humbly requests the Court to extend the time limitation in this Motion for a New Trial.

7. Just as in a criminal case the defendent has the right to dismiss his or her attorney, the treatment in a civil case should be the same and equal. The plaintiff should be allowed to dismiss his or her attorney. This may be the first case before the court where this question has been raised and therefore proper ruling is of a national interest so that the system of justice is preserved for the purpose of proper serving of justice. This infact is the only way to protect the clients from some undesirable attorneys. The answer should not be or even be suggested that the plaintiff initiate a law suite against her attorney for negligence, while the defendent goes free and enjoys the benifits of the plaintiff's attorneys negligence, while she is being subjected during the trial to her attorneys whelm.

Plaintiffs remaining facts are

A. plaintiff was deprived of the evidence she needed as previously stated in paragraph 1.
B. the evidence is material and will certainly produce a different result, when obtained and properly presented.
C. the evidence is not merely, but clearly impeaching and concluding and provide that the witnesses have purged under oath.

Thus all the criteria for granting of a New Trial are present and are satisfied and are satisfiable by the plaintiff, once the defendents produce the evidence and then the case is argued on the base of that evidence. Mr. Hooks argument of heresay evidence should prove to the court that Mrs. Meek atleast have two different version of Ms. Susan Morse's promotion, the first one was

thrown out in court by the testimony of Mrs. White and Mrs. Meek and the second version which was given as the testimony in the court, which is entirely different from the one that was given to the Division Of Human Rights on the day the division issued order of no probable cause. Now Mr. Hooks is trying to convince this Court that the investigation was only heresay and therefore statements made in that investigaion the court should not consider because that shows that the defendents personnel director has been telling any thing else buth the truth.

9. Plaintiff requests the defendent to produce the ORIGINAL COPY of Dr. Sprinkles medical examination report of the plaitiff dated June 21, 1979. This report is very importent and relavent to this case. Mrs. Meeks testimony at the trial clearly provides that Mrs. Meek asked the plaintiff, that she the plaintiff may not excercise her constitutional right to relegious freedom, in order for her to continue working for the Tompkins County Trust Company.

10. Further Mr. Hooks affidavit was signed on April 19, 1984 and sworn on the same day, but he does not send this affidavit to the plaintiff until April 27, 1984 along with the defendents memorandum of law in opposition to plaintiffs motion for n new trial, which was signed on April 27, 1984. Plaintiff received this complete package on May 1, 1984.

CONCLUSION

By reason of the forgoing it is respectfully requested that the Court considers and Extends the time for filing of this Motion for a New Trial and grant the plaintiff'f request for a new trial in the best interest of the justice and to protect her constitutional right, where especially Human Rights of an individual are vio-

lated and it is this great nation which is formost in preservation of human rights on this globe. Submitted respectfully,
May 3, 1984

Bharati Desai Pro.Se.
10 Greystone Dr.
Dryden, N.Y. 13053
607/844/4566

APPENDIX H

Plaintiff's Employment Application.

H-1

APPLICATION FOR EMPLOYMENT

(PLEASE PRINT PLAINLY)

The Civil Rights Act of 1964 prohibits discrimination in employment because of race, color, religion or national origin. Public Law 90-202 prohibits discrimination because of age. The laws of some states prohibit some or all of the above mentioned types of discrimination.

PERSONAL Date: 6/8/1979

Name: Desai, Bharati, R. Social Security No. 102-60-1500

Present address: 10 Greystone Drive, Dryden, N.Y. 13053

How many years have you lived at this address?

2 years & 4 months Telephone No. (607) 844-4566

Previous address: London, U.K.

How long did you live there? 3 years

Job(s) applied for 1. Teller Rate of pay expected $ open

How did you learn of this opening?

From my friend who is working in your Dryden Branch

Do you want to work ☑ Full-Time

Have you worked for us before? No

List any friends or relatives working for us:

Mrs. Sandy Williamson

If hired, on what date will you be available to start work? Open

Are there any other experiences, skills, or qualifications which you feel would especially fit you for work with the Company?

Experience working in a Bank in India and Law background.

If hired, do you have a reliable means of transportation to get to work? Yes

Do you have any physical handicaps which would prevent you from performing specific kinds of work? No

Have you had a serious illness in the past 5 years? ☒ No

Have you ever received compensation for injuries? ☒ No

Person to be notified in case of accident or emergency:

Name: Ravi Desai Phone Number: (607) 844-4566

Address: 10 Greystone Drive

EDUCATIONAL BACKGROUND

Type of School — Name and Address — How Many Years Attended — Graduated — Course or Major:

Grammar or Grade — Orna High School — India — 5.

High School — M.K.D. High School — India — 5 —
☒ Yes S.S.C.

College — M.T.B. Arts College — Sulat, India — 4 —
☒ Yes — B.A.

Post Graduate — V.T.C. Law College — Sulat, India — 2 —
☒ Yes — LL.B.

Business or Trade — V.T.C. Law College — Sulat, India — 1 —
☒ Yes — Advocate.

TO THE APPLICANT:

Do not answer any *italicized* question below the double line unless the employer has checked the box next to the question. A check indicates that the information requested is needed for 1) a bonafide occupational qualification, 2) is in compliance with national security laws, or 3) other legally permissible reasons.

☑ *Are you over 21 years of age?*	☑ *Yes*
☐ *When were you born?*	4-1-1948
☐ *How old are you?*	30
☐ *Sex:*	☒ *Female*
☐ *Height:*	*5 ft. 3 in.*
☐ *Weight:*	121 *lbs.*
☐ *What is your marital status*	☒ *Married*
☐ *When were you married?*	Jan. 31, 1977
☐ *How many dependents do you have (including yourself)?*	*None*
☐ *Are you a United States Citizen?*	☒ *No*
☐ *Have you registered for the Draft?*	☒ *No*
☐ *Please tell us when you attended school:*	
☐ *Elementary --*	*From* 1953 *to* '58
☐ *High School —*	*From* 1958 *to* '64
☐ *College —*	*From* 1964 *to* 1968
☐ V.T.C. *(other) —*	*From* 1970 *to* 1972

PERSONAL REFERENCES

(Excluding Former Employers or Relatives)

Name and Occupation — Address — Phone Number:

Mr. Richard Adams, F.N.B. of Ithaca, Cashier — 3 Greystone Dr., Dryden — 844-4405.

Dr. M. Lahiri, M.D. — 3 Madision St., Cortland — 753-3826.

Jeff Pearlman, N.C.R. — 2 Greystone Dr., Dryden — 844-8361.

PRIOR WORK HISTORY

(List In Order, Last or Present Employer First)

Dates: From - To — Name and Address of Employer — Reason for Leaving:

1969-'70 — V.T.C. Sulat High School, Sulat, India, Teacher — Temporary Vacancy.

1970-'71 — T. & T.V.M. High School, Sulat, India, Teacher — Temporary Vacancy.

June 1972-'73 — Working as an Advocate with V.T.C. Law College, Sulat, India.

1973- — Dist., Co-op Bank, Vyaha, India — Study.

May we contact the employes listed above? Yes

Occasionally the form of an application blank makes it difficult for an individual to adequately summarize his complete background. To assist us in finding the proper position for you in our company, use the space below to summarize any additional information necessary to describe your full qualifications:

I was selected by The Law Society of London to be a qualified as a solicitor.

Thank you for completing this application form and for your interest in employment with us. We would like to assure you that your opportunity for employment with this company will be based only on your merit and on no other consideration.

PLEASE READ CAREFULLY
APPLICANT'S CERTIFICATION AND AGREEMENT

I hereby certify that the facts set forth in the above employment application are true and complete to the best of my knowledge. I understand that if employed, falsified statements on this application shall be considered sufficient cause for dismissal. You are hereby authorized to make any investigation of my personal history and financial and credit record through any investigative or credit agencies or bureaus of your choice.*

Signature of Applicant /s/Bharati R. Desai

*NOTE: The Provisions of the Fair Credit Reporting Act may be applicable if a credit report on the applicant is obtained and considered.

APPENDIX I

Employment Application of Susan Morse.

APPLICATION FOR EMPLOYMENT

(answer all questions — please print)

In compliance with Federal and State equal employment opportunity laws, qualified applicants are considered for all positions without regard to race, color, religion, sex, national origin, age, marital status, or the presence of a non-job-related medical condition or handicap.

Date of Application: May 18, 1979

Referral Source: ☑ Relative

Name: Morse, Susan, Ann Social Security No. 128445880

Address: 278 Lower Cr. Rd. Rt 7, Ithaca, N.Y. 14850

Phone: (607) 347-4560; Parents 257-7246

Are you known to schools/references by another name? ☑ No

Have you filed an application or been employed here before? ☑ No

Are you a Citizen of the United States? ☑ Yes

Are you available to work? ☑ Full Time

Do Any of your Friends or Relatives Work Here? ☑ Yes

If Yes, List Name(s) Mr. Raymond Van Houtte

Are you? ☑ 18-70

Have you been convicted of a felony or released from prision within the last 7 years? ☑ No

In case of accident or emergency, please notify:

Name: Dr. and Mrs. Roger A. Morse

Address: 425 Hanshaw Rd., Ithaca

Phone No.: 257-7246

An Equal Employment Opportunity Employer M/F

What Foreign Languages Do You Speak, Read, and/or Write Fluently?

Speak German, Fair — Read German, Fair — Write German, Fair.

Can You Travel If A Job Requires It? ☑ Yes

Have You Been Bonded? ☑ No

Do You Have A Disability, A Handicap or A Medical Condition That Limits Your Job Performance? ☑ No

Are You A Veteran? ☑ No

List Trade or Professional Organizations Of Which You Are A Member, Including Offices Held:

Cortland Kappa Delta Pi (Program Committee)

PEO Sisterhood BJ Ithaca — Guard, Special Projects

Give Name, Address and Phone Number Of Three References Not Related To You:

Mr. Raymond Van Houtte

Strawberry Lane, Ithaca

Mrs. Ernestine Wright

Hanshaw Rd., Ithaca — 257-0027

Mr. & Mrs. V. H. Fogg

415 Hanshaw Rd., Ithaca — 257-7080

Employment Experience — List each job held. Start with your present or last job. Include military service assignments and volunteer activities. — Employer — Address — Job Title — Supervisor — Reason for Leaving — Dates — Hrly. Rate/Salary — Work Performed [This section of Application Form left blank.]

Summarize Special Skills and Qualifications Acquired From Employment Or Other Experience:

I enjoy working with people by having past experience in teaching, in 4-H for 7 years and my college experiences. In addition I have minimal office skills and have willingness to learn and work.

Education

School Name:

Cayuga Heights, Elementary — Years Completed: 6

Ithaca High School — Years Completed: 12 — Diploma/Degree: Regents

Cazenovia College, AA — Cortland State, BS — Cortland State, MS

Years Completed: 4 — Graduate: 1

Describe Course Of Study:

A.A.; B.S. in Education; M.S. in Education

Describe Specialized Training, Apprenticeship, Skills, and Extra-Curricular Activities:
Cortland Kappa Delta Pi
Cortland Nu Sigma Chi Sorority
Cazenovia Equestrian Club
Cazenovia Intercollegiate Equestrian Team
Cazenovia Orientation Club (Co-Chair)

Agreement

I certify that answers given herein are true and complete to the best of my knowledge.
I authorize you to make such investigations and inquiries of my personal, employment, financial or medical history and other related matters as may be necessary in arriving at an employment decision.
I hereby release employers, schools or persons from all liability in responding to inquiries in connection with my application.
In the event of employment, I understand that false or misleading information given in my application or interview(s) may result in discharge. I understand, also, that I am required to abide by all rules and regulations of the Company.

/s/ Susan A. Morse May 18, 1949

CURRICULUM VITAE

SUSAN A. MORSE

Parent's address:
425 Hanshaw Road
Ithaca, New York

(607) 257-7246
Date of Birth: 7/28/55

Present address:
278 Lower Cr. Rd.
Rt 7
Ithaca, New York
(607) 347-4860

[PHOTO]

PROFESSIONAL PREPARATION:

Cortland State College, Cortland, New York — Masters Program — May 1979 (Expected Graduation Date); Major — Early Childhood

Cortland State College, Cortland, New York — B.S. — May 1977; Major — Elementary Education (N-6)

Cazenovia Jr. College, Cazenovia, New York — A.A. — May 1975; Major — Liberal Arts

Ithaca High School, Ithaca, New York — Regents Degree — June 1973 — Major — Regents

STUDENT TEACHING

Dryden Elementary School — Pre-1 grade (Team Teaching)
Dryden, New York — Fall 1976
Cooperating Teacher — Mrs. Wilma Rose
Supervisor — Dr. Helen E. Smith

West Hill Elementary School — Combination 5-6 grades
Ithaca, New York — Fall 1976
Cooperating Teachers — Mrs. Ernestine Wright, Mr. John Coulter
Supervisor — Ms. Susan Bliss

EXPERIENCE

Volunteer Helper — Cortland Child Development Center, Cortland, New York — Spring 1976

Volunteer Helper — Cortland Headstart, Cortland, New York — Spring 1976

Private Riding Instructor — Morse Stables, Ithaca, New York — 1969-1978

HONORS & AWARDS & MEMBERSHIPS

Cornell Faculty Childrens' Scholarship — 1973-1977
Cortland Kappa Delta Pi (Program Committee) — Spring 1977
Cortland Nu Sigma Chi Sorority (House President, Executive Board, Assistant Rush) Spring 1977-78
Cazenovia Matching Scholarship — 1973-1975
Cazenovia College Dean's List — 1973-1975
Cazenovia Equestrian Club — 1973-1975
Cazenovia Intercollegiate Equestrian Team — 1973-1975
Cazenovia Orientation Club - CO-CO'S — 1974-1975

WORLD TRAVEL

1964 — France, Germany, The Netherlands, Switzerland, England

1967 — Japan, Philippines, Thailand, India, Italy, England, Germany, Switzerland, Spain, Azores

1971 — Mexico

1971 — Poland, Russia, England, Germany

1973 — Domincan Republic

Other — Canada

SPECIAL INTERESTS

Plants; Swimming; Skating; Equestrian Art; Animals — Dogs, Cats, Horses; Music — Piano, Recorder

REFERENCES ON REQUESTS

Office of Career Planning and Placement, Twin Towers, Cortland State College, Cortland, New York 13045

APPENDIX J

Portion of defendant's attorney's closing argument at trial.

going to break it down into two causes of action. The initial cause of action Mrs. Desai contends that she was the victim of invidious discrimination because of the failure to promote her to what she characterizes as the head teller position, a position that she was unaware of until August of 1979 and a position that she contends in her complaint that she was by far the most qualified to take.

Now, that first cause of action has to be measured by the test enunciated by the Supreme Court in MacDonald Douglas. And he has to demonstrate not only that she was a minority, but likewise that there was a position available, that she was qualified for that position, that she applied for that position, and that after she was rejected for the position that the defendant continued to look for yet another person to fill that vacancy. Your Honor, I think the proof demonstrates that she has deficiencies in everything but the fact that she is a minority. Let me take them serially.

With respect to the position, it is uncontradicted that in May of 1979 Mrs. Meek interviewed Susan Morse. I think her resume and her application will demonstrate that she was 23, 24 years old, was getting a master of arts degree, I think it was in education, it may have been psychology, I think it was education, and that

(Daniel E. Mayo, C.S.R.)

she was a resident, a long resident of the Dryden area. Mrs. Morse — or Mrs. Meek was impressed by these credentials and, impressed by her personal interview, contacted Mr. Lynn and said I know you are going to have this vacancy when Pam Ordway leaves, let me suggest to you this person, I am sending out the resume. Lynn says perfect, just who I want. For whatever reason, because she has various commitments that summer, she doesn't actually start until August 1.

But, your Honor, that position was filled in May of 1979. Morever, Mrs. Desai didn't even apply for that position. She didn't even know who Pamela Ordway was, she didn't know what Pamela Ordway was doing. She learned of an opening at the bank through her neighbor Sandra Williamson and she testified yesterday that she knew that there was a Sheila Moore who was working there and she knew that Sheila Moore was going to leave. And at some point in time Sandy Williamson left that summer. Mrs. Desai was hired to take that position. Mrs. Morse had been hired prior to our ever knowing Bharati Desai. Mrs. Susan Morse was hired in May of 1979, for all intents and purposes, to fill the Ordway position.

Now, even assuming for the moment that the position was not filled, the next question is was she qalified for the position? She makes — she raises two

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allegations, your Honor, two facts that she contends show that she was more qualified. One, the seniority and, two, the experience, and let me take both of those. One, the seniority, if any there be, was infinitesimal, when you compare it with the time that Susan Morse started, August 1, the time that Bharati Desai started, which was June 18. We are talking a period of approximately six weeks. Certainly that fact alone, and I think it was — I think Mrs. Meek testified to this and it was — it makes common sense you don't simply take somebody and say simply because you have been here six weeks longer than the other I'm going to give you that position. There has to be more than simply seniority, particularly when it's only six weeks of seniority.

And then how about the experience? The experience that Mrs. Desai had when she started in June of 1979 was as a banker in India, working in a bank in India, which she testified was an entirely different banking system. So both the seniority and the experience, your Honor, for all intents and purposes, are meaningless when you consider the qualifications. And there certainly are

additional qualifications. There are qualifications that you can get along with customers, that you won't have communication problems, either with your customers or with your co-workers. The ability to get along with your

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co-workers. These are all very important factors, too, which enter into it. And Mrs. Meek, when she met Susan Morse in May of 1979, knowing that the fundamental — the primary importance factor for any lead teller, for any teller, actually, is the way they interrelate to people. She was sure that Susan Morse could fill that position. And that's why Susan Morse got it.

Now, moreover, the final feature there under the MacDonald test, and that is she was rejected for the position and we kept on looking. As I say, the position had been filled. And Bharati Desai was never rejected for the position. She was hired for the Williamson position or the Moore position. She was hired for a teller's position. She was not rejected for the the Pamela Ordway position. And also the question of whether this did constitute a, quote, promotion. Both Susan Morse and Bharati Desai were teller ones. And there's absolutely no evidence that there was any salary differential whatsoever.

Let me, if I may, move on then to the question of the retaliatory discharge. In that cause of action she contends that she was summarily discharged, to use her words, referring to her complaint, on the heels of mentioning discrimination to Helen Meek on September 12, 1979. In point of fact, your Honor, she was not

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discharged on the heels of making that comment. And I think, your Honor, when you are considering whether there was any retaliatory animus here you can ask yourself two questions. The primary question, and I keep coming back to this, because I do

think it's critical, is if you were going to discriminate, if you were going to make your case to bounce somebody because of — because they had raised this comment, you don't have your branch manager give a satisfactory to almost above satisfactory evaluation two weeks later. It's nonsensical. Absolutely nonsensical. If you are going to be building your paper war here, your paper case against her, you don't do it by giving her a satisfactory evaluation within two weeks after the comment discrimination had been made.

Frankly, the comment had been made, Helen Meek addressed the question on the 12 of September, and it was a dead issue at that point. It was a dead issue on September 12, 1979. We wanted to make sure that she was going to be able to continue to work at the Dryden branch, we wanted to make sure that if she had some patience and would learn all these various functions that a teller would perform, that's what Helen Meek told her, she said, Bharati, please, go back and get along with your co-workers, give it some time. At the time of the comment she had been out at the Dryden branch for what, for two

(Daniel E. Mayo, C.S.R.)

APPENDIX K

Portion of Branch Manager Lynn's Deposition.

We were having some customer comments and complaints. Dryden is a nice community, but it's — there aren't many people from other countries there, that come to our branch anyway. Where aren't — it's a homogeneous community, to say the least, as far as ethnic backgrounds and those kinds of things.

So I felt Bharati was trying, and I really felt it behooves us and the community to try — you know, it wouldn't hurt the community to have some people in there that didn't speak and sound exactly the way we all did.

I felt she deserved a chance.

Q You mean Bharati was your token minority?

MR. HOOKS: Object to the form of the question.

A I wouldn't say that at all.

Q Wouldn't you consider that to be a better than average evaluation?

A No, not really.

Q Why did you mark the box that says —

A Doing an average job, and I put an arrow going over here towards this (indicating). This is my own notation here. This right here is what I'm saying. I

MR. HOOKS: I take it there were going to be two vacancies.

THE WITNESS: Yes, we knew this.

A Susan Morris is from the Dryden area. Her father's a professor at Cornell. She's familiar with the people in the area. She lives not far from Dryden. She has all of her life. I hadn't even met Susan Morris. I had just seen her resume and knew she was

coming to the branch or bank. So there was no question in my mind. I had asked and designated Susan Morris would be my lead person, for example, working in the vault. You can't have three or four people working in the vault to get currency out.

Well, Susan Morris was going to be filling that spot. And if I w oing to be out of the branch, I felt someone had to take re- s sibility for making decisions and decisions needed to be made.

Q Was Pam Ordway your lead person up to that point?

A Yes. So there is no head teller at the Dryden branch.

Q There is a lead person?

experience.

Q You knew that Susan Morris had no prior banking experience; did you not?

MR. HOOKS: Object to the form.

A Yes.

Q Can you explain again why you had Susan Morris picked for the spot of lead person prior to her coming to the bank?

A Susan Morris — Dryden is a small community. We try to hire people who live in Dryden and the Dryden area. Susan Morris was from our area out there. My assumption was she would know more people than some other folks might.

Certainly in communicating, I knew I would have an easier time, perhaps, having someone who was more experienced in our culture and would know — I would have felt that I would have probably been more comfortable with that person.

Q You're aware of the provisions in the employee manual, are you not?

A What provisions? What are you talking about?

Q Specifically, could you state what your

APPENDIX L

Portions of Bank's Policy Manual.

2) In recognition of extra effort or initiative.

3) For problems relative to job responsibility.

All reviews become a permanent part of each employee's personnel record.

OPPORTUNITIES FOR ADVANCEMENT

As an equal opportunity employer, we will hire, promote or transfer the most qualified person. Promotion is based on personal merit and qualifications, and whenever practical vacancies are filled from within the organization. Many of our officers and supervisors have been promoted from other positions on our staff. Occasionally a job requires specific skills and training which none of the Bank's present employees possess. It is then necessary to go outside of the Bank to fill vacancies. The primary consideration in hiring or promoting must be the applicant's qualifications.

Job openings which are not filled by a qualified person from within the department or office where a vacancy occurs are communicated to other employees by means of a job opening notice which is prepared and sent to each office for immediate posting. Each job opening notice states the time period during which the employee

must make his/her interest known to the Director of Personnel and gives the names of persons to contact for further information. Selection is based on job-related qualifications, relevant experience, length of service, and a personal interview with the employee by the Manager or Officer in Charge and the Director of Personnel. Present employees are given consideration over outside applicants.

Supervisors will recommend to the Director of Personnel employees qualified for future consideration for exempt and officer positions. Any employee may advise the Director of Personnel of his or her interest in new job responsibilities to ensure consideration. The above procedures are administered completely without regard to sex, race, creed, color, national origin, age, marital status, or handicap.

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TERMINATION POLICY

The Bank will make every effort to help each person to adjust to his or her job and fellow workers and to Bank policy. Only as a last resort will someone be asked to leave. In any case, dismissal (except for cause) will not take place until the employee's performance has been discussed and prior warning has been given to him or her.

Reasons for dismissal following a period of probation are: inability to do work assigned, excessive absenteeism or tardiness, poor work habits, insubordination and overdrafts. We consider the following to be examples of cause for immediate dismissal: dishonesty, use of alcohol or illegal drugs on premises, breach of confidentiality, and failure to conform to stated Bank policy.

FAREWELL PARTIES

The Bank will sponsor a farewell party for any employee who has been with the Bank for over three years who is not leaving for another job. Employees may use the Bank's premises for farewell parties for other employees, at their own expense.

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APPENDIX M

Plaintiff's "Probationary Employee Report," dated September 26, 1979.

PROBATIONARY EMPLOYEE REPORT

NAME: Desai, Bharati, R. POSITION: Teller I
DEPARTMENT: Dryden DATE EMPLOYED: Hired 6/18/79

RATING OF EMPLOYEE: *(Carefully evaluate each of the qualities separately.)*

QUALITY OF WORK —	✓ SATISFACTORY
QUANTITY OF WORK —	✓ SATISFACTORY
PERSONALITY —	✓ SATISFACTORY
PERSONAL APPEARANCE —	✓ SATISFACTORY
ATTENDANCE —	✓ SATISFACTORY
DEPENDABILITY —	✓ SATISFACTORY

OVERALL EVALUATION in comparision with other employees with the same length of service on this job:

✓ Definitely above average.

Excellent Attitude — appetite for knowledge & experience. Willing to adapt. Communication (language, terminology etc.) occasion confusion but will improve with exposure & experience.

RECOMMENDATION:

A. Do you recommend that this probationary employee be continued as a regular employee?

YES__X__

9/26/79 RATED BY: Richard Lynn

APPENDIX N

Letter of Susan Morse, dated November 16, 1979.

Susan A. Morse
278 Lower Creek Road
Rt 7
Ithaca, New York 14850

Mrs. Helen Meek
Personnel Director
Tompkins Co. Trust Co.
110 North Tioga St.
Ithaca, New York 14850

Nov. 16,1979

Dear Mrs. Meek,

In evaluating my working relationship with Bharati Desai there are a number of factors to consider.

Understanding the difficulties associated with living in a foreign country, one must become acclimated to communicating with the native people. Adjusting to local colloquialisms in the form of language, gestures, and general social behavior is vital when dealing with the public. Bharati, in the short time in which we worked together, showed a great ability to recognize and adapt to social differences. Although she was making an effort there were overwhelming cultural, social and personality barriers between her and the customers and her and her fellow workers.

In regard to the mechanical aspects of the position she held, Bharati was generally thorough and accurate once she acquired the necessary skills. In the process of achieving this level of perfection, Bharati's priorities were such that she would not cooperate with her fellow workers to accommodate customers in a logical manner. Since the Dryden office of the Tompkins Co. Trust Co. is a small branch, all employees must work together cooperatively in order for all to perform their duties effectively. Bharati's attitude was one of competitiveness rather than cooperativeness,

which interfered with the effective functioning of the branch.

I can sympathize with the problems Bharati faced in her job. However in the position which Bharati held it was necessary for her to be able to deal with the public effectively in order to present a positive image of the bank to the public.

Sincerely,

s/ Susan A. Morse

Susan A. Morse

APPENDIX O

Portion of Trial Transcript.

MR. BENJAMIN: I have no further questions.

THE COURT: Any questions?

MR. HOOKS: Nothing.

THE COURT: Thank you Mrs. Cornish. You may step down.

(The witness was excused.)

THE COURT: We will stake a short recess.

(Court recessed at 11:12 a.m. and reconvened at 11:45 a.m.)

MRS. DESAI: Your Honor, I like to approach the bench, if you don't mind.

THE COURT: I will speak to your counsel, Mr. Benjamin.

(Plaintiff and Mr. Benjamin conferred.)

MR. BENJAMIN: For the record, I raised the question of settling this case with my colleague, and I suspect that's what this stems from. I don't know how you want to handle it. She is asking to speak to you personally.

THE COURT: Well, you see, as long as you are represented by a lawyer, Mrs. Desai, you have to speak through him. And you convey whatever you want to me through him and if you want to — if there is a proper reason for me so speak to you, I will. But I can't do it —

MRS. DESAI: Yes, your Honor. I would like to know my rights. There are some question in my mind which I would like to clarify.

THE COURT: Well, you see, that's why you have a lawyer. He can tell you what your rights are. We are here in court for me to determine whether or not your rights have been violated in this case.

MRS. DESAI: I understand.

THE COURT: That's the reason you are here in court. And Mr. Benjamin is proving or attempting to prove that your rights have been violated. And the defense is attempting to prove that they haven't. And I can't make any judgment on that until I hear all of the proof. So you have to speak through your lawyer. I will be glad to have him present anything to me that you want him to present.

MRS. DESAI: Thank you, your Honor.

THE COURT: Why don't we go ahead with the proof and then over the noon hour you talk to Mr. Benjamin and if there is something you want to convey to me he will convey it to me.

MRS. DESAI: Thank you, your Honor.

THE COURT: All right. You are welcome. All right, Mr. Benjamin.

MR. BENJAMIN: Call Richard Lynn.

(Daniel E. Mayo, C.S.R.)

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MR. HOOKS: I sent him down the hallway to do something for me. He will be right back.

(There was a pause in the proceedings.)

(The witness was duly sworn.)

MR. BENJAMIN: Judge, can we approach the bench one minute?

THE COURT: Yes, you and counsel.

(The court and counsel conferred at the side bar.)

DIRECT EXAMINATION BY MR. BENJAMIN:

Q. State your name and address for the record, please.

A. Richard Stanley Lynn, 2 Evergreen Street, Dryden, New York.

Q. And are you presently employed?

A. Yes, sir.

Q. In what capacity?

A. Branch manager of the Dryden branch of the Tompkins County Trust Company.

Q. And were you so employed in the summer of 1979?

A. Yes.

Q. How long have you been branch manager?

A. Since July of '79 — '77, excuse me. 1977.

Q. And what are your responsibilities in that position?

(3)

No. 84-1573

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CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1985

BHARATI DESAI,

Petitioner,

vs.

TOMPKINS COUNTY TRUST COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the record in this case establishes that the Second Circuit improperly applied the clearly erroneous standard of review under Rule 52(a) of the Federal Rules of Civil Procedure.

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BHARATI DESAI,

Petitioner,

vs.

TOMPKINS COUNTY TRUST COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent respectfully requests that this Court deny the petition for a writ of certiorari in this case.

STATEMENT OF THE CASE

Petitioner commenced this action against her former employer, Tompkins County Trust Company (hereinafter "TCTC")[1], in United States District Court for the Northern District of New York pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* The complaint alleged that TCTC discriminated against petitioner by failing to give her a job promotion. Petitioner further alleged that TCTC terminated her employment in retaliation for her protestations concerning alleged discriminatory treatment. A third claim,

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[1] Pursuant to U.S. Sup. Ct. Rule 28.1, TCTC has no parent companies, subsidiaries or affiliates.

based upon an alleged breach of contract, was dismissed prior to trial and is not involved in this application.

On March 7, 8 and 9, 1984, the case was tried by the District Court (Hon. Neal P. McCurn, Justice Presiding), which rendered its judgment and order dismissing petitioner's complaint on March 26, 1984. The judgment was duly entered on April 4, 1984. The District Court determined that TCTC's decisions to deny petitioner a promotion and, ultimately, to terminate her employment were based on her poor work habits and job performance, not on her national origin. Accordingly, the District Court concluded that TCTC had not discriminated against petitioner in violation of Title VII.

On April 18, 1984, petitioner moved for a new trial pursuant to Rule 59(a) of the Federal Rules of Civil Procedure. On April 19, 1984, petitioner filed a notice of appeal with respect to the judgment entered on April 4, 1984. On May 8, 1984, the District Court denied the motion for a new trial as untimely under Rule 59(b) of the Federal Rules of Civil Procedure.

The Court of Appeals affirmed the District Court in all respects in an unpublished decision.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS WAS IN CONFORMITY WITH DECISIONS OF THIS COURT.

In adopting the District Court's findings of fact and conclusions of law, the Court of Appeals properly applied and followed the decisions of this Court. Petitioner contends that the Court of Appeals' decision is inconsistent with decisions of this Court and of other Circuit Courts of Appeals. In her effort to demonstrate inconsistency, petitioner argues that the Court of Appeals misconstrued the "clearly erroneous" standard of review under Rule 52(a) of the Federal Rules of Civil Procedure. This claim is to-

tally devoid of factual and legal support. Initially, the unpublished statement of decision by the Court of Appeals lacks precedential value and, in any event, cannot give rise to any inconsistency. Further, the decision is silent concerning the manner in which the Court of Appeals applied the clearly erroneous standard. Thus, petitioner's assertion that the Court of Appeals misconstrued the clearly erroneous standard is pure speculation.

Even assuming that the Court of Appeals applied the clearly erroneous standard to its review of the District Court's ultimate finding on the issue of discrimination *vel non,* it acted in conformity with this Court's recent decisions. This precise issue was considered in *Pullman-Standard v. Swint,* 456 U.S. 273, 290 (1982), where this Court held that a district court's factual finding on the issue of discriminatory intent is subject to the clearly erroneous standard of review under Rule 52(a). Here, as in *Pullman-Standard,* the factual inquiry was whether intentional discrimination had occurred. Thus, the Court of Appeals' summary affirmance was entirely consistent with this Court's prior decisions.

II. THERE IS NO INTRACIRCUIT CONFLICT.

The Court of Appeals' decision denying remand on petitioner's motion for a new trial is not in conflict with *Jenkins v. Chemical Bank,* 721 F.2d 876 (2d Cir. 1983). Unlike the present case, *Jenkins* involved a pretrial request for assigned counsel on the ground of inability to afford private counsel. *Jenkins* did not even involve a motion pursuant to Rule 59(a) of the Federal Rules of Civil Procedure and, therefore, cannot be considered as establishing any procedure within the Second Circuit for determining such motions.

Nor does *Weiss v. Hunna,* 312 F.2d 711 (2d Cir. 1963) establish such a procedure. In *Weiss,* the District Court elected to treat an untimely Rule 59(a) motion as a motion under Rule 60(b). The

District Court denied the motion, but its order was jurisdictionally defective because a notice of appeal had been filed. The Court of Appeals treated the *pro se* appeal as a motion to remand but, relying on the District Court's opinion, denied the motion.

Neither *Jenkins* nor *Weiss* establishes a remand procedure which requires an untimely Rule 59(a) motion to be treated as a motion under Rule 60(b). Moreover, petitioner has demonstrated no factual basis that would justify remand. Petitioner argues that remand should have been granted so that the District Court could have considered her claim of inadequacy of counsel. Such action by the Court of Appeals would be particularly inappropriate in view of the District Court's observation that "for the record [petitioner's counsel] very adequately represented [petitioner]". (Petition App., C-6)

III. THIS CASE INVOLVES NO SPECIAL OR IMPORTANT ISSUES REQUIRING THIS COURT'S ATTENTION.

Petitioner has failed to demonstrate that this case will have any significant effect upon persons other than the parties to this case or that the circumstances herein are likely to reoccur. Her remaining contentions merely relate to the sufficiency of her proof. Specifically, she argues that the District Court should have concluded that her discharge, though not retaliatory, was discriminatory. There was no basis for the District Court to reach this conclusion, particularly in view of its finding that petitioner's "inability to get along with her co-workers, unwillingness to accept authority, language difficulties, abruptness, slowness and body odor prompted her termination on October 19." (Petition App., B-10)

Nor did the District Court substitute its own theory in concluding that TCTC did not discriminate against petitioner. Although TCTC claimed at trial that another employee had previously been designated for the position which petitioner sought, it also

argued, in the alternative, that petitioner was not qualified for the position, even if it was available. (Petition App., J-2 - J-3)

Accordingly, this case does not merit review by this Court.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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